

Order in the Court

*Medieval Procedural
Treatises in Translation*

Bruce C. Brasington



BRILL

MEDIEVAL LAW AND ITS PRACTICE

MEDIEVAL LAW AND ITS PRACTICE

VISIT...

LANZAROTE
Caliente.COM

Order in the Court

Medieval Law and Its Practice

Edited by

John Hudson (*St. Andrews*)

Editorial Board

Paul Brand (*All Souls College, Oxford*)

Emanuele Conte (*Università Roma Tre/EHESS, Paris*)

Dirk Heirbaut (*University of Ghent*)

Richard Helmholz (*University of Chicago*)

Caroline Humfress (*Birkbeck, London*)

Magnus Ryan (*Peterhouse, Cambridge*)

Robin Chapman Stacey (*University of Washington*)

VOLUME 21

The titles published in this series are listed at *brill.com/mlip*

Order in the Court

Medieval Procedural Treatises in Translation

By

Bruce C. Brasington



BRILL

LEIDEN | BOSTON

Cover illustration: *Judgment of Solomon* by Lievin van Eeghem (Mechelen), made between 1602 and 1638. Object number 42328, inventory number BMH bs00488. Photo: Museum Catharijneconvent, Utrecht (Ruben de Heer).

Library of Congress Cataloging-in-Publication Data

Names: Brasington, Bruce Clark, 1957– editor.

Title: Order in the court : medieval procedural treatises in translation / By Bruce C. Brasington.

Description: Leiden : Brill, 2016. | Series: Medieval law and its practice | Includes bibliographical references and index.

Identifiers: LCCN 2016002540 (print) | LCCN 2016002645 (ebook) | ISBN 9789004214347 (hardback : alk. paper) | ISBN 9789004315327 (E-book)

Subjects: LCSH: Civil procedure (Canon law)—History. | Civil procedure (Roman law)—History. | Law, Medieval.

Classification: LCC KBU3825.O73 2016 (print) | LCC KBU3825 (ebook) | DDC 262.9/2—dc23

LC record available at <http://lcn.loc.gov/2016002540>

Want or need Open Access? Brill Open offers you the choice to make your research freely accessible online in exchange for a publication charge. Review your various options on brill.com/brill-open.

Typeface for the Latin, Greek, and Cyrillic scripts: “Brill”. See and download: brill.com/brill-typeface.

ISSN 1873-8176

ISBN 978-90-04-21434-7 (hardback)

ISBN 978-90-04-31532-7 (e-book)

Copyright 2016 by Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill, Brill Hes & De Graaf, Brill Nijhoff, Brill Rodopi and Hotei Publishing.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill NV provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA. Fees are subject to change.

This book is printed on acid-free paper and produced in a sustainable manner.

Uxori carissimae meae



Contents

Acknowledgments IX

Preface XI

Glossary XX

Abbreviations XXVII

Introduction 1

- 1 The Ecclesiastical *Ordo iudiciorum* Around 1100 25
- 2 The Early Romano-Canonical Process: The Worlds of Hariulf and Bulgarus 52
- 3 The Anglo-Norman *Ordo iudiciarius*: Pseudo-Ulpianus, *De edendo* 112
- 4 William of Longchamp's *Practica Legum et decretorum* 172
- 5 The *Ordo Bambergensis* 197

Conclusion 276

Selected Bibliography 287

Index of Sources and Parallels 316

General Index 324

Acknowledgments

The genesis of this study was at the 2006 Leeds International Medieval Congress. That year, a number of sessions honored Dr. Linda Fowler-Magerl, whose studies of the *ordines iudiciorum* lie behind much of what follows. I hope that my translations and commentary advance the study of twelfth-century procedural law to which she has made such fundamental contributions.

I have many other colleagues to thank as well. Professor Dr. Gert Melville and the Heidelberger Akademie der Wissenschaften made it possible for me to work in both Dresden and Leipzig in 2011 and 2013. At Dresden, I was able to present early drafts of this study at the Forschungsstelle für Vergleichende Ordensgeschichte. The comments from the seminar were, as always, most helpful. At Dresden, Dr. Jörg Sonntag was able to obtain for me a copy of Placentinus' *Summa* on the *Codex*, a vital work for any student of the twelfth-century *ordines*. Visits to the *Sondersammlung* at the University of Leipzig were a pleasure thanks to the hospitality of Dr. Makert. I also thank Professor Dr. Susanne Lepsius of the Leopold-Wenger Institut at Munich for permitting me to work at the Stephan Kuttner Institute of Medieval Canon Law in 2013; the Institute's new director, Dr. Winroth, also graciously allowed me later to work at Yale in 2015. I also thank Dr. Jörg Müller, Dr. Giesela Drossbach, and Dr. Danica Summerlin for their hospitality and patient assistance during my stay in Munich. Dr. Kathleen Cushing's invitation to speak at a Cambridge symposium in the spring of 2011, sponsored by CLASMA (Church Law and Society in the Middle Ages), and funded by the English Higher Education Resource Council, afforded me the chance to discuss the *ordines* and legal change before an acute and friendly audience. It was an honor and pleasure to be able to work at Oxford (Bodleian Library) and Cambridge (University Library, Trinity College, Wren Library) in the preparation of this study.

Turning my attention to home, I thank my colleagues at West Texas A&M for their friendship and counsel, especially Professors Pearson and Bowman for their helpful comments on early drafts. Without the tireless efforts of the Inter-Library loan staff at West Texas A&M, I could not have even conceived of attempting this study. I am also grateful for the grant by the WTAMU Alumni Foundation that defrayed some of my expenses while in Munich. The one-course reduction granted by Dean Jessica Mallard was most welcome during the spring semester, 2014.

I am grateful to Brill and, especially, Ms. Marcella Mulder, for her assistance throughout this project. I thank as well the anonymous reader, whose comments were helpful and concise. Dr. John Hudson has patiently answered all

sorts of questions ranging across medieval law and society. His reading of an initial draft also caught many problems, both great and small, and I have greatly benefitted from his corrections and suggestions. What errors remain are my responsibility alone.

Two senior colleagues, whom I also count as friends, must be specially thanked. Dr. Martin Brett has been a great support to me not only during this project but throughout my academic career. I am particularly grateful for his permission to use his unpublished work on the *De edendo*. Professor Dr. Peter Landau has been, for almost three decades, a second *Doktorvater*. I cannot thank him too much for his friendship and guidance. I hope what follows will reflect, if inadequately, my admiration for these scholars.

Above all, I thank my wife, Darlene. Over the years, she has endured my enthusiasm for, and complaints about, Hincmar of Reims, Ivo of Chartres and, now, among others, William of Longchamp. Her good humor has only been exceeded by her unfailing love and support. I dedicate this book to her and to the One whose love is the fullness of the law.

Preface

*Matt. 18:15–17*¹

If your brother or sister sins, go and point out their fault, just between the two of you. If they listen to you, you have won them over. But if they will not listen, take one or two others along, so that ‘every matter may be established by the testimony of two or three witnesses.’ If they still refuse to listen, tell it to the church; and if they refuse to listen even to the church, treat them as you would a pagan or a tax collector.

1 Corinthians 6:1–6

If any of you has a dispute with another, do you dare to take it before the ungodly for judgment instead of before the Lord’s people? Or do you not know that the Lord’s people will judge the world? And if you are to judge the world, are you not competent to judge trivial cases? Do you not know that we will judge angels? How much more the things of this life! Therefore, if you have disputes about such matters, do you ask for a ruling from those whose way of life is scorned in the church? I say this to shame you. Is it possible that there is nobody among you wise enough to judge a dispute between believers? But instead, one brother takes another to court—and this in front of unbelievers.

The New Testament never denies that the first Christians disagreed, sometimes violently. From the tale of Ananias and Sapphira to the confrontation between Peter and Paul at Antioch, we have ample evidence that they, as do their fellow believers today, often failed the commandment to ‘love one another.’² Matthew also reminds us that Jesus had admonished His followers to settle disputes amongst themselves in the hope that reconciliation might occur.³ From Paul we learn, however, that some were so aggrieved they felt compelled to take their disputes to the secular court. Litigants and lawyers, courts and

¹ Both from the *New International Version*, accessed at <http://www.biblegateway.com/versions/New-International-Version-NIV-Bible/> on 3 June 2014.

² Acts 5:1–11. Bruce C. Brasington, “Remember Always Ananias and Sapphira,” in *Obedientia: Zur Formen und Grenzen von Macht und Unterordnung im mittelalterlichen Religiosentum*, ed. S. Barret and G. Melville (Münster, Hamburg, London, LIT Verlag: 2005), 83–97. On the incident at Antioch, see Gal. 2:11–14.

³ Matt 18:15–17.

judges were present from the beginning of the Church. They form the subject of this study.

What follows is neither a general history nor specific focus on any aspect of procedure. While much remains to be studied, there is certainly no lack of learned works. For the classical civil law there are already numerous comprehensive and specialized studies.⁴ While much more will be said in upcoming chapters about the emergence in the twelfth century of the *ius commune*, the amalgam of civil and canon law that would shape ecclesiastical law for centuries to come, there are many valuable works that have appeared in recent decades.⁵ Scholars also have written extensively on procedure in the early and medieval canon law.⁶ Building on this considerable body of scholarship, I shall translate and comment on selected medieval procedural texts, mostly *ordines*

-
- 4 Max Kaser, *Das römische Zivilprozeßrecht* (Munich: Beck, 1996), H.F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge: Cambridge University Press, 1972), W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd ed., rev. by Peter Stein (Cambridge, Cambridge University Press, 2007), George Mousourakis, *The Historical and Institutional Context of Roman Law* (Aldershot: Ashgate, 2003), Barry Nicholas, *An Introduction to Roman Law* (Oxford, Oxford University Press, 1962), O.F. Robinson, *The Criminal Law of Ancient Rome* (London and Baltimore: Johns Hopkins University Press, 1995).
 - 5 Richard H. Helmholz, *The Ius Commune in England. Four Studies* (Oxford: Oxford University Press, 2001), 3–15, also, generally, *Handbuch der Quellen und Literature der neueren europäischen Privatrechtsgeschichte*, ed. Helmut Coing, vol. 1: *Mittelalter, 1100–1500. Die gelehrten Rechte und die Gesetzgebung* (Munich: Beck, 1973). Still fundamental is Hermann Kantorowicz, *Studies in the Glossators of the Roman Law. Newly Discovered Writings of the Twelfth Century*, (Cambridge: Cambridge University Press, 1938). Other important studies include Hermann Lange and Maximiliane Kriechbaum, *Römisches Recht im Mittelalter*, vol. 2: *Die Kommentatoren* (Munich; Beck, 2007), Mario Ascheri, *The Laws of late Medieval Italy. Foundations for a European Legal System* (Leiden: Brill, 2013), Emanuele Cortese, “Droit médiéval. Un débat historiographique italien,” *Annales HSS* (novembre–décembre 2002): 1593–1613, Kenneth Pennington, “Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept,” *Rivista internazionale di diritto commune* 5 (1994): 187–209, accessed on 18 June 2014 at <http://faculty.cua.edu/pennington/learned.htm>.
 - 6 Linda Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius. Begriff und Literaturegattung* (Frankfurt am Main: Klostermann, 1984) and *Ordines iudiciarii and libelli de ordine iudiciorum: From the middle of the twelfth to the end of the fifteenth century*, (Turnhout: Brepols, 1994). For an encyclopedic study, Wieslaw Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii*, 2 vols. (Krakow: Jagiellonian University Press, 1999); more recently, Knut Wolfgang Nörr, *Romanisch-Kanonisches Prozessrecht: Erkenntnisverfahren Erster Instanz in Cvilibus* (Berlin: Springer Verlag, 2012) and James Brundage, *The Medieval Origins of the Legal Profession. Canonists, Civilians, and Courts* (Chicago and London: University of Chicago Press, 2008).

iudiciorum,⁷ written for study and potential use in twelfth-century ecclesiastical litigation.

Save for a very few excerpts, none of these treatises has been translated.⁸ It is hoped that translation and commentary will shed light on the theory and practice of legal process in the ecclesiastical forum during the twelfth century. Ideally, these works, sometimes overlooked in the study of medieval legal and institutional history,⁹ will gain the attention of a wider audience.

This study is in two parts. The first is generally conceived, with an introduction surveying Roman and ecclesiastical procedure from Antiquity to the early Middle Ages. We consider as well the interrelationship of civil and canon law following the triumph of Christianity in the Empire after the fourth century, in particular the development of the bishop's court, the *audientia episcopalis*. The opening chapter then treats ecclesiastical procedure around 1100, the eve of the Romano-canonical process initiated by renewed, formal study of the civil law. We focus on letters from two French bishops, Marbode of Rennes and Ivo of Chartres. The next chapter enters the procedural revolution by translating and commenting upon three texts. The first is the Marturi Case, the first western citation of the *Digest*, Emperor Justinian's great encyclopedia of the civil law, in litigation since the early Middle Ages. Next comes a translation of Abbot Hariulf of Oldenburg's visit to the papal curia in 1141. The account of his hearing before the chancellor, Haimeric, and Pope Innocent II is not only interesting in its own right but also provides the context for the lengthy letter which Bulgarus, one of the Bolognese 'four doctors' of the law, wrote to Haimeric about procedure. Dating as well from the 1140s, this was a pioneering work in the Romano-canonical procedure.

Chapters in the second section translate and comment upon *ordines* from the Anglo-Norman realm during the remainder of the twelfth century. The Pseudo-Ulpianus, *De edendo*, Bishop William of Longchamp's *Practica Legum*, and the *Ordo Bambergensis* all reflect jurisprudence shaped by the developing legal power of Rome and the increasingly sophisticated commentary on the civil and canon law taught at urban schools and universities. No less influential for procedure was the increasing number of papal decretals, the 'new law' that

7 Litewski, *Zivilprozeß*, 52–53 notes both *ordo iudiciarius* and *iudiciorum*, the latter found most commonly in legistic works. There are other terms as well. For the sake of consistency, I shall stay with *ordo iudiciorum*.

8 An exception is Hunt Janin, *Medieval Justice. Cases and Laws in France, England and Germany 500–1500* (Jefferson, NC and London: McFarland and Co., 2004), 33 translating Stephen of Tournai's description of the *ordo iudiciarius*. For more on this text, see chapter 3.

9 Fowler-Magerl, *Ordines*, 100.

would become normative by the early thirteenth century. These *ordines* also were responding to a dramatic increase in ecclesiastical litigation which, in turn, required more and more trained men. Archdeacons and their assistants handled the case load on the diocesan level and dealt with visiting legates and judges-delegate appointed by Rome to settle disputes.¹⁰ These men were some of the readers the *ordines* hoped to reach.

The Conclusion will reflect on both the commonalities among the *ordines* and the unique features each displays. It will address the degree to which the *ordines* reveal the synthesis of civil and canon law in the procedure of the *ius commune* and to what extent they responded to legal practice. Placing the *ordines* in the wider context of the medieval contribution to legal science and practice, it considers how these works played a role in the formation of a procedurally-oriented, rational (at least in theory) law, whose political, social, and even religious legacy is still very much with us today.

Each *ordo* sheds light on a particular stage of development in ecclesiastical procedure. The *De edendo* provides a thorough treatment of civilian process. Canon law plays a prominent role in the *Practica legum*. Finally, the *Ordo Bambergensis* is conversant with both laws, and completely focused on the ecclesiastical court. The author's comprehensive treatment of procedure also points the way towards Richardus Anglicus and Tancred of Bologna, whose manuals would soon eclipse the earlier treatises.¹¹

10 On the archdeacon's role in diocesan government, Brigitte Basdevant-Gaudemet, "L'Archidiacre et le Gouvernement local de l'église d'après la législation conciliaire (milieu xii^e–milieu xiii^e siècle)," in *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, ed. Bernard d'Alteroche, et al. (Paris: Éditions Panthéon-Assas, 2009), 91–108. On the *officialis*, who was beginning to supplant the archdeacon by the late twelfth century, Fowler-Magerl, *Ordines*, 84. None of the *ordines* in this study treat this office.

11 Richardus Anglicus (Richardus de Mores), educated at Bologna, was in England by the early thirteenth century and served King John. He travelled to Rome and was present at the Fourth Lateran Council (1215). He studied in Paris and was active as a visitor in the English church. His *ordo* was a major advance from the *ordines* studied in this volume: Richardus Anglicus, *Die Summa de ordine iudiciario des Richardus Anglicus*, ed. Ludwig Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, 11, 3 (Innsbruck, 1915, rp. Aalen: Scientia Verlag, 1962). Tancred of Bologna, archdeacon and teacher, composed his *ordo* in the early thirteenth century: *Pillii, Tancredi, Gratiae libri de iudiciorum ordine*, ed. F. Bergmann (Göttingen 1842: rp Aalen: Scientia Verlag, 1965), 89–314. On these works, Fowler-Magerl, *Ordo iudiciorum*, 14–19, 128–30, and *Ordo*, 2–3. Additional information can be found at <http://faculty.cua.edu/pennington/1140a-z.htm> accessed on 18 May 2014. On Tancred's contribution to ecclesiastical procedure, Knut Wolfgang Nörr, *Zur Stellung des Richters in gelehrten Prozess der Frühzeit: iudex secundum allegata non secundum conscientiam iudicat* (Munich: Beck, 1967), 5 and n. 16.

The availability of ancient and medieval legal texts in translation reflects at least to some extent the state, if any, of their critical editions. For the civil law, thanks to more than a century of sustained editorial work, there are reliable editions of the *Corpus iuris civilis* and its principal formal sources, for example the *Theodosian Code*.¹² These have provided the texts for useful English translations.¹³ I have consulted these on numerous occasions but, nevertheless, must emphasize that all translations are my own.

-
- 12 The *Corpus iuris civilis* was completed under Justinian's direction in the early sixth century. A team of jurists led by Tribonian compiled the *Digest*, *Codex*, and *Institutes*. The *Digest* harvested and organized Roman law from the jurists down to Justinian's time. Its fifty books provided the reader with a comprehensive encyclopedia drawing upon earlier works, notably the fifth-century *Codex Theodosianus*. The *Codex* contained imperial constitutions and was considered to possess legal authority. The *Institutes*, largely compiled from the work of the jurist Gaius, was intended to be a textbook for study. Later works of the civil law also serving as sources for the treatises translated in this work are the *Novellae* and *Authenticum*. The first, as its name suggests, was a collection of 'new' laws, that is imperial constitutions dating after 534 AD. The *Authenticum* was a later work consisting of 134 *novellae* (novels) that, as we shall see, was widely used in the twelfth century. (Sometimes our authors cited the *Authenticum*; at other times, they may be using excerpts, called the *Authenticae*, on which see Tamm Wallinga, "Authenticum and Authenticae—What's in a Name? References to Justinian's Novels in Medieval Manuscripts," *Tijdschrift voor Rechtsgeschiedenis* 77 (2009): 43–59.) A Latin summary of the *novellae* was made in the middle of the sixth century by Julian, a professor of law at Constantinople. The *Epitome Juliani* was also used by medieval jurists, but supplanted by the *Authenticum/authenticae* during the twelfth century. I have consulted these editions: *Corpus iuris civilis*, 3 vols., ed. Theodor Mommsen et al. (Berlin: Weidmann, 1888, rp. 1954) accessed at both <https://archive.org/details/corpusjuriscivilookrueuoft> and <http://www.thelatinlibrary.com/justinian.html> and *Codex Theodosianus, cum constitutionibus Sirmondinis*, ed. Paul Krueger and Theodor Mommsen, 2 vols. in 3 (Berlin: Weidmann, 1905, rp. 1990), accessed at <http://ancientrome.ru/ius/library/codex/theod/tituli.htm>. On the *Novellae*, <http://www.uwo.edu/lawlib/justinian-novels/> and Blume's valuable "annotated Code," with translation, available at <http://www.uwo.edu/lawlib/blume-justinian/>. For the novels and their later reception, including the *Epitome Juliani* and the *Authenticum*, which supplanted it in the twelfth century, in addition to Wallinga, Timothy G. Kearley, "The Creation and Transmission of Justinian's Novels," *The Law Library Journal* 102.3 (2010–12): 377–97, accessed at <http://www.aallnet.org/mm/Publications/llj/LLJ-Archives/Vol-102/publljv102n03/2010-22.pdf> on 29 May 2015.
- 13 For example, S.P. Scott, *The Civil law, including the Twelve tables: The Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo* (Cincinnati: Central Trust, 1932), available at <http://www.constitution.org/sps/sps.htm> and the superior translation by Justice Blume, available online at <http://unwacadweb.uwo.edu/blume&justinian/novels2.asp>.

Things are far different for the canon law. Very few critical editions exist, and even fewer translations. The most important text of all, at least for the purposes of this study, the *Decretum* of Gratian, the encyclopedia of canon law compiled in the middle of the twelfth century,¹⁴ remains trapped in a nineteenth-century edition which, while a heroic scholarly achievement, is inadequate and sometimes misleading.¹⁵ Granted, when one considers the *Decretum's* sheer size and complexity, it is no surprise that only a few sections have been translated into any language,¹⁶ and almost nothing from those treating procedure. We are somewhat better served for the earlier canon law, as we have translations of early-medieval penitential collections,¹⁷ and the *Collection in 74 Titles*, an important compilation from the early stages of ecclesiastical reforms in the late eleventh century that eventually provoked the Investiture Contest between pope and German king.¹⁸ However, apart from some canons in the *Collection in 74 Titles* derived from the Pseudo-Isidorian forgeries (on which see the Introduction), there is little available to aid someone interested in the development of Romano-canonical procedure but lacking sufficient Latin to read the original texts.

14 On Gratian, see the introduction to chapter 3.

15 Nevertheless, it remains currently the only edition commonly used: *Decretum Magistri Gratiani* ed. Emil Friedberg: *Corpus Iuris Canonici*, volume 1. (Leipzig: Bernhard Tauchnitz, 1879, rp. Akademische Druck- u. Verlagsanstalt, 1959). I have used the version available online at <http://geschichte.digitale-sammlungen.de/decretum-gratiani//text/>. Only recently have decades of scholarly complaints about this edition been answered by Anders Winroth, whose pioneering research has inspired and provoked a considerable number of scholars to engage the *Decretum's* textual tradition. For more on this, see chapter three.

16 Gratian. *The Treatise on Laws (Decretum DD. 1–20)*, tr. Augustine Thompson; *with the Ordinary Gloss*, tr. James Gordley; and *an Introduction by Katherine Christensen* (Washington: The Catholic University Press, 1993). For translations of the *causae* treating marriage, see *Marriage Canons from the Decretum of Gratian and the Decretals, Sext, Clementines, and Extravagantes*, translated by John T. Noonan, Jr., edited and supplemented by Augustine Thompson, accessed at <http://faculty.cua.edu/Pennington/canon%20Law/marriagelaw.htm> on 10 July, 2014 and Jean Werckmeister, *Décret de Gratien. Causes 27 à 36. Le Mariage* (Paris: Les Éditions du Cerf, 2011).

17 John McNeil and Helen Garner, *Medieval Handbooks of Penance* (Columbia: Columbia University Press, 1990).

18 John Gilchrist, *Collection in Seventy-Four Titles. A Canon Law Manual of the Gregorian Reform* (Toronto: Pontifical Institute of Medieval Studies, 1980). For a German translation of the tenth-century compilation compiled by Regino of Prüm, Wilfried Hartmann, *Das Sendbuch des Reginos von Prüm* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2004). Hartmann also comments on the text.

My translations are entirely based on the extant editions, most well over a century old.¹⁹ I am aware that all the texts deserve fresh, critical study.²⁰ New editions, especially of a work like the *De edendo*, which survives in a fair number of manuscripts, would undoubtedly change, perhaps substantially, the Latin text; obviously, this would affect not only the translation but also shed new light on its sources, both formal and material.²¹ Any commentary would then be greatly improved. As valuable as that enterprise would be, I have elected not to undertake fresh examinations of the manuscripts or attempt new collations.²²

Many challenges confront the translator. The vocabulary is fraught with difficulties, not least the terms from the ancient civil and canon law, terms already centuries old when twelfth-century writers cited them.²³ There are allusions, for example to the Bible, that defy easy translation.²⁴ We should remember as well that our authors were frequently responding to one another, which can complicate the text considerably.²⁵ The same word or phrase also may have had different meanings to authors.²⁶ For example, *ius* and *reus*, both technical terms of fundamental importance, (respectively, 'right' and 'accused/convicted')²⁷ could be read variously by medieval jurists.²⁸ Another example

-
- 19 On using older editions, with valuable remarks in general about textual criticism and editing medieval texts, Eric Knibbs, "How to Use Modern Critical Editions of Medieval Latin Texts," *History Compass* 5,5 (2007): 1521–49.
 - 20 The Latin texts do not accompany these translations. All are available, however, in the public domain, and they have been scanned to this website: <http://wtamu.edu/academics/order-in-the-court.aspx>
 - 21 On formal and material sources, the former, the source, the latter the text itself, Joseph Ryan, *St. Peter Damiani and his Canonical Sources. A Preliminary Study in the Antecedents of the Gregorian Reform* (Toronto: Pontifical Institute of Medieval Studies, 1956).
 - 22 To give but one example, the many glosses to the Pseudo-Ulpianus, *De edendo* would repay a fresh examination.
 - 23 Hermann Kantorowicz, *The Definition of Law* (Cambridge: Cambridge University Press, 1958), 2.
 - 24 Litewski, *Zivilprozeß*, 10, also Gilchrist, *Canon Law*, 250 and, in the same volume, Kenneth Pennington, "Roman and Secular Law," 254–66.
 - 25 Pennington, "Roman and Secular Law," particularly emphasizes this 'conversational' language. The *Ordo Bambergensis*, treated in the final chapter, will illustrate this.
 - 26 Pennington, "Roman and Secular Law," 258.
 - 27 I have generally translated *reus*, however, as "defendant."
 - 28 Knut Wolfgang Nörr, "Zur Frage des subjectiven Rechts in der mittelalterlichen Rechtswissenschaft," in *Festschrift für Hermann Lange*, ed. Dieter Medicus, et al. (Stuttgart, Berlin, Cologne: W. Kohlhammer, 1992), 193–204. On *reus*, Pennington, "Roman and Secular Law," 261, noting it could mean both defendant and convicted. On the varying

is *agere* (generally rendered as “to charge/sue”), whose meaning could vary according to context.²⁹ Throughout, I have tried to offer an English equivalent for such technical terms; very occasionally, however, I have left the Latin in the text, as some terms and phrases have no convenient English equivalent.³⁰ Explanatory notes guide the reader here.³¹

There is also style. Perhaps no branch of Latin is more prone to the passive voice than the law. I have tried to render some of these passages into the active voice. However, at no point have I attempted a paraphrase, even with lengthy sections replete with repetition. Another stylistic concern is the prevalence of the subjunctive mood. Unlike modern English, where the indicative increasingly replaces it, the subjunctive was integral to classical and medieval Latin. Given the frequency of conditional clauses in legal texts, our treatises thus have more than their share of subjunctive constructions. I have elected to retain it in most instances.

Even with a conservative approach to translation, interpretation and stylistic judgment are always at work.³² Even with such well-known texts such as the *Digest*, modern scholarly interpretations and, hence, their translations,

usages of terms by Rufinus and Stephen of Tournai, Ronald G.G. Knox, “The Problem of Academic Language in Rufinus and Stephan,” in *Proceedings Berkeley*, 109–23.

29 Note Pennington, “Roman and Secular Law,” 261.

30 Two examples found in our *ordines* illustrate this: *litis contestatio*, which I have translated as “joinder of issue;” *plus petitio*, ‘overclaim,’ on which see Litewski, *Zivilprozeß*, 12–13.

31 Among many reference works consulted, Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, rp. 1980). Also frequently consulted were Lewis and Short’s *Dictionary*, accessed at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3atext%3a1999.04.0059>; J.F. Niermeyer, *Mediae Latinitatis Lexikon Minus*, accessed at <https://archive.org/details/NiermeyerLexiconMinus1976>; Alexander Souter, *A Glossary of Later Latin to 600AD* (Oxford: Clarendon, 1998); “Words” by William Whittaker, accessed at <http://www.archives.nd.edu/cgi-bin/words.exe>; *Glossarium mediae et infimae latinitatis*, ed. Du Cange, et al., 6 vols. (Nior: L. Favre, 1883–1887), accessed at <http://ducange.enc.sorbonne.fr/PRACTICA2>.

32 This was also the case with medieval authors. See Mary E. Sommar, “Dionysius Exiguus’ Creative Editing,” in *Proceedings Washington*, 209. The canon treats episcopal translation, whether a bishop could leave one see for another. One should also not overlook textual manipulations or even forgeries. On Burchard of Worms’ altering texts, Greta Austin, “Jurisprudence in the Service of Pastoral Care: The *Decretum* of Burchard of Worms,” *Speculum* 79 (2004): 947–48, also Wilfried Hartmann, “Autoritäten im Kirchenrecht und Autorität des Kirchenrechts in der Salierzeit,” in *Die Salier und das Reich*, 3 vols. ed. Stefan Weinfurter (Sigmaringen: Jan Thorbecke Verlag, 1991), 3.431.

continue to vary. As one scholar has put it, 'all conclusions are provisional.' This is certainly true for the present study.³³

An introduction to each chapter will treat the context of the text or texts that will be translated and discussed. The introduction will summarize the text(s), offer comparisons with other works in this study, and highlight distinctive features. To aid the reader's understanding of both the translation and the text's argument, footnotes will note the sources used directly or indirectly and reference pertinent scholarship. There will be cross-references and comparisons with other works, especially *ordines* and commentaries on the civil and canon law.

By way of conclusion, I turn to one of the medieval authors who will play a supporting role in this study. In the preface to his *Summa* on Gratian's *Decretum*, Stephen of Tournai likened himself to a host who has invited two guests, a canonist and a theologian, to a banquet.³⁴ He worried that each must be content with what he served. The following chapters present a feast as well. The theologian and canonist are now the cooks, joined by the civil jurists, whose fare is often exotic indeed. The diners, from specialists to students, must be satisfied no less than those whom Stephen invited almost nine centuries ago. This host hopes what follows will please. *His praelibatis ad litteram veniamus*. Having offered these things, let us come to the text.³⁵

33 William M. Gordon, "Translation and Interpretation," in *Critical Studies in Ancient Law and Legal History. Essays in Honour of Allan Watson*, ed. John W. Cairns and Olivia F. Robinson (Oxford and Portland: Hart, 2001), 72, discussing Dig. 17.1.6.6–7.

34 On Stephen, see below, chapter 3.

35 *Prefaces to Canon Law Books in Latin Christianity. Selected Translations, 500–1245*, ed. Robert Somerville and Bruce C. Brasington (New Haven: Yale University Press, 1998), 201, the conclusion to his *summa*'s preface.

Glossary

The following lists selected Latin terms frequently translated in this work. Definitions generally, but not always, have been derived from Berger's *Encyclopedic Dictionary of Roman Law*. With few exceptions, I have not included terms having essentially equivalent meanings in English. A fuller explanation, with accompanying reference to Berger and other sources, will appear in the footnotes to the translations.

Acta	Ecclesiastical documents often issued as charters. These cover everything from grants of land to the settlement of disputes. Sometimes they survive as originals; often, they are copies. A significant number are forgeries.
Actio	A claim or suit.
Actio directa	The most common sense is a suit arising from a contract creating a liability.
Actio in rem	A suit concerning the recovery of something.
Actio in personam	A suit claiming someone's liability either due to some offense (delict) or breach of contract.
Actio perpetua	In the classical civil law, an action not specifically limited to a single year's validity.
Actio utilis	An action modifying an earlier suit, the <i>actio directa</i> .
Adminiculum	A remedy or legal support strengthening one's position in a case or giving the opportunity to improve it.
Agere	In the classical law 'to bring an action,' it means to sue or plead before a judge.
Alieno nomine	To act in court on another's behalf.
Archdeacon	An important figure in medieval diocesan government, there were several for each diocese. In the twelfth century, he was bishop's primary legal official.
Authenticum	This Latin collection of 134 imperial decrees (novels) was compiled sometime around the middle of the sixth century. Mostly a translation of the Greek novels, it was discovered in the early twelfth century at Bologna, shortly after the reintroduction of the <i>Digest</i> to the court. It takes its name from the assumption made by the early glossators that this compilation had been authorized by Justinian himself.
Calumnia	Trickery, deception, or any sort of subterfuge. The <i>sacramentum de calumnia</i> , the calumny oath, will figure prominently in the <i>ordines</i> .

Capitularia	Written decrees issued by Frankish kings, notably Charlemagne.
Causa	There are several meanings. In the law, both canon and civil, it could mean 'case' or 'reason.' It is also the title of the second section to Gratian's <i>Decretum</i> , where 36 <i>causae</i> , divided into questions (<i>quaestiones</i>), present case studies.
Causidicus	One who pleads a case, an advocate.
Cautio de rato	The surety given by a proctor that the principal on whose behalf he is acting approves.
Cautio iuratoria	This surety strengthens an obligation by means of an oath.
Cavere	The giving of surety.
Chirograph	A type of medieval document cut in two and authenticated when the two pieces matched.
Cognitio	The judge's hearing of a case.
Cognitio extra ordinem	Replacing the formulary procedure of the Roman Republic, this process placed procedure under the magistrate, who ultimately represented the emperor.
Cognitor	In the earlier Roman law, this was a legal representative in a trial. In the later law, the procurator (proctor) took his place.
Cognitor in rem suam	The plaintiff.
Compromittere	The parties agree to submit their dispute to an arbiter.
Condemnatus	Convicted or judged.
Confessio in iure	When the defendant acknowledges the plaintiff's charge before the judge. The <i>ordines</i> will treat this when considering proof.
Contumacia	Contumacious disobedience towards a magistrate; most commonly this is ignoring a summons to court. It is roughly equivalent to the modern concept of contempt of court.
Contumelia	Abuse, affront, even physical violence.
Convenire	To take to court. It can mean making an agreement.
Corruptela	What corrupts, for example a bribe.
Council	An ecclesiastical meeting, most often of bishops.
Damnatus	The technical meaning is condemnation, even to capital punishment. It can also carry the sense of convicted/sentenced, the common meaning in the <i>ordines</i> .
Decretal	A papal letter, either authentic or forged. From the outset, decretals were not only consultative but also intended to carry a legal opinion, even a decision, which increasingly would be their role in the developing <i>ius novum</i> of the twelfth century. Collected in compilations, notably the <i>Quinque antiquae compilationes</i> , they eventually formed

	the code of canon law, the <i>Liber Extra</i> , promulgated by Pope Gregory IX in 1234. How to ascertain the authenticity of a papal decretal will concern our authors, especially William of Longchamp.
Defensor	Someone defending another in a trial.
Delict	Wrongdoing. See also <i>maleficium</i> .
De rato	Concerning the surety given by a proctor ensuring that the principal he represents will approve of his conduct in the litigation.
Dictum	In addition to the most common meaning 'said,' as the past participle of the verb <i>dicere</i> , it was Gratian's running commentary to his <i>Decretum</i> . (The plural is <i>dicta</i> .)
Dilatio	Adjournment or delay.
Distinctio	Along with the general meaning of 'distinction,' as in distinguishing a difference between two things or topics or highlighting a point in an argument, it was the title of the first section of Gratian's <i>Decretum</i> , where 101 <i>distinctiones</i> consider legal topics pertinent to the canon law.
Dolo malo	With evil intent.
Dominus litis	The one in whose name a trial was conducted by a proctor he appointed.
Duplicatio	Raised to oppose a <i>replicatio</i> .
Eremodicium (heremodicium)	The unexplained/unexcused absence of a party in court.
Exceptio	A challenge raised in a trial. These took a number of forms, for example raising an exception to delay a trial due to the defendant's need to travel or that the plaintiff's witnesses were not qualified to testify. The <i>ordines</i> will treat these and many more.
Exceptio rei iudicatae	An exception raised by the defendant that he had already been sued for the same thing in another trial and that it had been adjudicated.
Executor	The one responsible for executing the judge's sentence.
Editio actionis	The plaintiff's initial charge against the defendant.
Edictum peremptorium	The peremptory edict informed an absent defendant that the trial would still be conducted whether he was present or not.
Fama	The root of 'fame,' it had the sense of reputation and possessed legal force. Its opposite, <i>infamia</i> , was serious, and in the ancient civil law carried legal penalties such as exclusion

	from public office or, for procedure, the inability to represent someone as a proctor. It is an equally serious condition in the medieval canon law.
Infitiari	To deny the plaintiff's charge.
In iure	Held in court before the magistrate.
Inscriptio	The act of accusing.
Instrumenta	Most commonly, documents, legal 'instruments.'
Interruptio civilis	An interruption in the possession of real property that occurs with the <i>litis contestatio</i> , when one claiming ownership charges the possessor.
Interruptio naturalis	An interruption in the possession of real property due to the property being lost.
Iudex qui litem suam facit	Literally, this is "a judge who makes the trial his own." When a judge intentionally judges deceptively, he becomes liable for damages.
Iuratoria cautio	An oath given to strengthen the surety.
Ius	Most commonly, either a right or natural law distinguished from <i>lex</i> , on which see below.
Ius commune	Term given by scholars to designate the blending of civil and canon law during the twelfth century and thereafter. Its influence was felt throughout Europe, including England.
Iurisiurare	An oath/to make an oath. There were various types according to when it was given.
Ius patronatus	The right of a layman to present a candidate for an ecclesiastical benefice. It was vital to lay patronage over churches and frequently the subject of disputes. It also carried with it the danger of simony, the buying and selling of church offices, a very serious charge. It is comparable to <i>advowson</i> in the common law.
Iustus titulus	Literally 'just title,' it alleges just cause or pretext.
Legate	A legal representative. For the medieval canon law, especially in the twelfth century and thereafter, papal legal representatives possessing full authority and power. (See <i>plenitudo potestatis</i> .)
Lex	This is law issued by a competent authority and recorded in writing. It is comparable to the modern idea of 'positive law.'
Litterae dimissoriae	An appellant's written appeal.
Laesio enormis	A postclassical phrase common by the twelfth century. It means to sell something at less than half its value. An example would be if one promised to sell an item for 10 and,

	instead, sold it for 4, thus ‘injuring’ the owner for whom it was being sold.
Libellus	A written petition or bill that initiated proceedings.
Libellus conventionalis/ conventionis	A written complaint/bill to a judge stating the facts/reasons for the suit.
Litis contestatio	Joinder of issue.
Maleficium	Often equivalent to <i>crimen</i> or delict, it means any sort of wrongdoing.
Mandatum	A contract or mandate, where one agrees to take on the duty of completing a legal transaction or service on another's behalf. It is to be done gratuitously.
Missio in possessionem	This involved the dispersal of the property held by a convicted defendant. When he, as debtor or heir, was insolvent, creditors could obtain the property for eventual sale. In the classical law, the praetor used it to force obedience from a defendant who, though summoned, had neither come to court nor sent a representative.
Nuncius	A messenger acting as proxy. This is found in both the civil and canon law. In the canon law, it was connected with papal legation.
Opponere	To oppose in court, to object, to raise an exception.
Paciscere	To agree, to form a contract or pact.
Pacta vestita	Literally ‘clothed pacts,’ these could be sued for in court. There was also the related sense of a promise or agreement.
Patrocinium	Legal aid or defence in court.
Patronus causae	An advocate.
Plenitudo potestatis, pars sollicitudinis	A maxim in canon law dating from the pontificate of Leo the Great. Widely cited, especially in the twelfth century and thereafter, it declares that only the pope has ‘fullness of power,’ which he can then freely delegate to anyone. The remainder of the ecclesiastical hierarchy, in practice, archbishops and bishops, had ‘a share of the concern,’ (<i>pars sollicitudinis</i>).
Plus petitio	An overclaim.
Possessio	Possession. The civil law was very concerned to distinguish between possession and legal ownership. (See <i>proprietas</i> .)
Praeiudicare	To prejudge, prejudice in the sense of damaging a claim. It can also have the sense of a previous judgment or precedent.
Praescriptio	Prescription meant claiming title to land and any rights attached to it based on long enjoyment without any challenge. Arguments from prescription were common in

	the classical and also in the early canon law; prescription appears frequently in the twelfth century as a type of exception raised by a defendant. For example, the possessor of land argues that he has held it unchallenged for varying lengths of time, with ecclesiastical lands requiring the 'longest' period of forty years, and thus should have legal claim. This <i>praescriptio longissimi temporis</i> figures in our <i>ordines</i> . Prescription has connections with the Roman law <i>usucapio</i> .
Praesumptio	Presumption, a fact judged proven or possibly proven by inference from an established fact.
Praetor	In the classical Roman law, the magistrate with civil jurisdiction.
Privilegium fori	Literally 'privilege of court,' it was granted by the Christian emperors of the fourth century to clergy so that their cases could be heard solely under ecclesiastical jurisdiction. It would be a key issue in the twelfth-century conflict between Archbishop Thomas Becket and King Henry II of England.
Probatio	The meaning varies according to context. It can mean a trial or examination; other senses include approval or proof.
Procurator	A legal representative, a proctor, for someone. In the classical civil law, procurators could also be administrators appointed by the emperor.
Procurator in rem suam	One acting as his own representative or attorney concerning his own suit. This is a type of 'fictive' representation.
Proprietas	Legal ownership.
Provocare	To appeal a case to a higher court.
Quasi maleficcium	Liability for unintentional wrongdoing. It resembles negligence. An example would be if my cattle, without my intent or knowledge, trampled your crops.
Questio	Literally 'question,' it had other meanings, for example inquiry/examination.
Ratihabitio	Ratification or approval of a transaction done by a representative, generally a proctor. It has connections with mandate.
Re integra	The legal situation is unchanged. A related term, <i>restitutio in integra</i> , is very common in the <i>ordines</i> . Its sense is that the proceedings are restored to how matters stood at the beginning of the trial.
Refutatio	In an appeal to refute in writing.
Repetitio	To reclaim. Its meaning in the <i>ordines</i> is in connection to the raising of exceptions.
Replicatio	A response to an exception.

Res	The term has many meanings though, generally ‘property.’ It also can mean the matter in dispute.
Res dubiae	Doubtful, uncertain legal matters or questions.
Res iudicata	Case settled by a judge, often invoked as the <i>exceptio rei iudicatae</i> .
Res litigiosa	The object of a pending suit following the joinder of issue. Whoever held was protected from third-party claims. He also could not alienate or otherwise dispose of it.
Retractare	To rescind.
Rescript	In the classical law, the emperor’s response in writing to questions from his officials or petitions from citizens. Over time, they were seen as not just consultative but, in fact, law. The papal decretal would eventually come to resemble these, though its normative, exclusive force was still not established at the time of the <i>ordines</i> treated in this study.
Sisti	To produce or appear in court. The common phrase is <i>in iudicio sisti</i> , to appear in court in response to another’s demand.
Socius	Partner.
Solutio	Freeing a debtor from his debt. It can also mean payment.
Sportulae	Originally gifts, by the late empire they were fees paid to legal representatives, for example advocates. They also figured in concerns about lawyers’ ethics.
Stipulatio/stipulare	A stipulation, promise, obligation, or agreement given on demand.
Subire	To undergo or submit to.
Temeritas	Temerity or indiscretion. It can also have the sense of hastiness or rash behavior.
Tenere	To obtain or hold to legal liability.
Testificatio	In addition to the sense of giving testimony as a witness, it can mean to provide proof.
Testis idoneus	One legally able to be a witness.
Transactio	A type of agreement.
Turpitude	A bad reputation.
Usucapio	Acquiring possession of another’s land after a period of time.
Vocare	To call or summon.

Abbreviations

Ancient and Medieval Legal Texts

Authen.	<i>Authenticum</i>
C 1 q. 1 c. 1	<i>Causa 1 quaestio 1 capitulum 1</i> (in the <i>Decretum Gratiani</i>)
Cod. 1.1.1	<i>Codex Iustiniani</i> , book 1, title 1, lex 1
Cod. Th.	<i>Codex Theodosianus</i>
Comp. 1, 2, 3, 4, 5	<i>Compilationes antiquae</i>
D 1 c. 1	<i>Decretum Gratiani</i> , <i>Distinctio 1 canon 1</i>
d.a.c.	<i>dictum ante capitulum</i> (in the <i>Decretum Gratiani</i>)
d.p.c.	<i>dictum post capitulum</i> (in the <i>Decretum Gratiani</i>)
Dig. 1.1.1	<i>Digestum Iustiniani</i> , book 1, title 1, lex 1
Inst. 1.1.1	<i>Institutiones Iustiniani</i> , book 1, title 1, lex 1
JE, JK, JL	Phillip Jaffé, <i>Regesta pontificum romanorum ab condita ecclesia ad annum post Christum natum MCXCVIII</i> , 2nd ed., revised by S. Loewenfeld, (JL), F. Kaltenbrunner (JK), and P. Ewald (JE)
Nov.	<i>Novellae</i> (in the <i>Corpus Iuris Civilis</i>)
PL	<i>Patrologia Latina</i>
X 1.1.1.	<i>Decretales Gregorii IX (Liber Extra)</i> book 1, title 1, capitulum 1

Other Abbreviations

<i>Ad</i>	‘At’ a particular passage or text
<i>AKKR</i>	<i>Archiv für Katholisches Kirchenrecht</i>
<i>BL</i>	<i>British Library, London</i>
<i>BM</i>	<i>Bibliothèque Municipale</i>
<i>BMCL</i>	<i>Bulletin of Medieval Canon Law</i>
<i>BN</i>	<i>Bibliothèque Nationale, Paris</i>
<i>CCL</i>	<i>Corpus Christianorum. Series Latina</i>
<i>CCM</i>	<i>Corpus Christianorum, continuatio medievalia</i>
<i>CSEL</i>	<i>Corpus scriptorum ecclesiasticorum latinorum</i>
<i>DA</i>	<i>Deutsches Archiv für Erforschung des Mittelalters</i>
<i>EEA</i>	<i>English Episcopal Acta</i>
<i>Extra.</i>	<i>Extravagantes communes</i> , book 1, title 1, capitulum 1
<i>IRMAE</i>	<i>Ius Romanum medii aevi</i>
<i>JEH</i>	<i>Journal of Ecclesiastical History</i>

<i>MGH</i>	<i>Monumenta Germaniae Historica</i>
<i>MGH Ldl</i>	<i>Monumenta Germaniae Historica. Libelli de lite imperatorum et pontificum saeculis xi et xii conscripti</i>
<i>MIC</i>	<i>Monumenta iuris canonici</i>
<i>NA</i>	<i>Neues Archiv</i>
<i>NS.</i>	<i>New Series</i>
<i>Proceedings</i>	<i>Proceedings of the International Congresses of Medieval Canon Law (Boston, Toronto, Salamanca, Berkeley, Cambridge, San Diego, Munich, Syracuse, Catania, Washington, Esztergom)</i>
<i>RDC</i>	<i>Revue de droit canonique</i>
<i>SB</i>	<i>Sitzungsberichte</i>
<i>Summa Elegantius</i>	<i>Summa 'Elegantius in iure divino' (seu Coloniensis)</i>
<i>Summa Honorii</i>	<i>Summa Magister Honorii</i>
<i>Summa Rufini</i>	<i>Rufinus, Summa decretorum</i>
<i>Summa Simonis</i>	<i>Simon of Bisignano, Summa decretorum</i>
<i>Summa Stephani</i>	<i>Stephen of Tournai, Summa Decretorum</i>
<i>s.v.</i>	<i>sub verbo</i> (reference to a commentary on a word or phrase)
<i>TRG</i>	<i>Tijdschrift voor Rechtsgeschiedenis</i>
<i>UL</i>	<i>University Library</i>
<i>WH</i>	<i>Walther Holtzmann number</i>
<i>ZRG KA</i>	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung</i>
<i>ZRG RA</i>	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung</i>

Introduction

While the following chapters will treat various aspects of classical civil and canonical procedure, we should briefly discuss in general terms legal process in the Roman and early Christian worlds. By the Christian era, Roman law already had developed a considerable body of procedural law.¹ From the outset, it had been marked by orality, something most evident in oath-taking. Equally, it was, as one scholar has put it, ‘immediate’: a judge was supposed to hear the entire process.² As early as the fifth century BCE, the *Twelve Tables* had fixed the *legis actiones*, into whose strict categories all claims were supposed to fit.³ These rigid categories, however, challenged the praetor, the magistrate with legal authority,⁴ as litigation grew more complex over time. By the third century before Christ, pressure on the *legis actiones* had become too great, and a new procedure, the formulary system, emerged.⁵ With this, the praetor could fashion a formula to define any form of action that might appear. No longer bound by the terms of the *legis actiones*, he began to declare annual edicts.⁶ These defined, irrespective of what his predecessor had done, the circumstances that might prompt new remedies.⁷

The *Twelve Tables* had established many terms and procedures we shall encounter centuries later in the medieval *ordines*. They distinguished between plaintiff (*actor*) and defendant (*reus*), and designated the multiple stages of hearing,⁸ for example summons to court, *in ius vocatio* and the *litis contestatio*, ‘joinder of issue.’⁹ During the Republic, we find that the trial proceeded

1 In general, and discussing the pitfalls of reading modern procedural concepts back into the Roman sources, Ernest Metzger, “Roman Judges, Case Law, and Principles of Procedure,” *Law and History Review* 22.2 (2004): 243–75, accessed at www.IusCivile.com on 29 May 2014.

2 Metzger, “Roman Judges,” 22–23, 25.

3 For a brief discussion, see Jolowicz, *Historical Introduction*, 106–11.

4 Jolowicz, *Historical Introduction*, 45–47.

5 Nicholas, *Introduction*, 20–21.

6 Alan Watson, *Law Making in the Later Roman Republic* (Oxford: Clarendon, 1974), 31–62, also 88–94 on the magistrates and the courts.

7 Nicholas, *Introduction*, 21–23, also David d’Avray, *Rationalities in History. A Weberian Essay in Comparison* (Cambridge: Cambridge University Press 2010), 149–50 highlighting the formulary system’s contribution both to legal rationality and ‘instrumental efficacy.’ We shall return to D’Avray’s observations in the Conclusion.

8 Mousourakis, *Historical and Institutional*, 127–32, 139, 307–09.

9 Metzger, “Roman Judges,” 6, 8, also noting there is little subsequent evidence about the summons, even from Cicero, whose writings are fundamental for our understanding of

in two stages. The first, *in iure*, held before the praetor or any magistrate with jurisdiction, took care of the preliminary steps of the proceeding and established whether it concerned law or fact. Next came *apud iudicem*, where a private person was appointed to judge.¹⁰ He was not a professional;¹¹ his decision did not bind later judges.¹² This judge did not necessarily examine the evidence himself. As for proof, there was no ranking of oral or written evidence.¹³ (As we shall see in the course of this study, proof will greatly concern the twelfth-century civilians and canonists.) Even at this early stage, there was the possibility of appeal, *provocatio*, from his decisions.¹⁴

During the Empire, the formulary system began to yield to the growing legal and administrative power of the state. The move towards the *cognitio extra ordinem* was underway. The *cognitio* afforded the magistrate/judge greater flexibility to try cases.¹⁵ By the third century of the Christian era, the formulary system disappeared.¹⁶ At the same time, as part of an expanding imperial bureaucracy, we find a number of new judicial officials. Among these was the *iudex ordinarius*, the provincial governor. He took the place of the praetor for his province.¹⁷ His later incarnation in the twelfth-century *ordines* will merit frequent discussion.

Let us now consider the Church. Evidence for procedure in the early Christian community is sparse.¹⁸ Jews viewed the judge largely as an arbiter who rendered justice but tried, above all, to restore harmony among the

how litigation took place during the Republic. For a thorough study of the *litis contestatio* in classical law, Günther Jahr, *Litis contestation. Streitbezeugung und Prozeßbegründung im Legisaktionen—und im Formularverfahren* (Cologne, Graz: Böhlau Verlag, 1960). On this translation of *litis contestatio*, with concise discussion of both classical and medieval law, Richard H. Helmholz, "The *litis contestatio*: Its Survival in the Medieval *Ius Commune* and Beyond," in *Lex et Romanitas: Essays for Alan Watson*, ed. Michael Hoeflich, (Berkeley: The Robbins Collection, 2000), 73–90.

10 Summarized by Jolowicz, *Historical Introduction*, 46–47.

11 Metzger, "Roman Judges," 18–19.

12 Metzger, "Roman Judges," 10–12.

13 Fowler-Magerl, *Ordines*, 45.

14 Jolowicz, *Historical Introduction*, 10, noting the *Leges Valeriae* of 509, 449, and 300 BCE declaring that no Roman citizen could be executed without being granted appeal to the assembly.

15 Mousourakis, *Historical and Institutional*, 376.

16 Metzger, "Roman Judges," 9–10.

17 Jolowicz, *Historical Introduction*, 460–61.

18 Wilfried Hartmann, "Der Bischof als Richter nach den kirchenrechtlichen Quellen des 4. Bis 7. Jahrhunderts," in *La giustizia nell'alto medioevo, secoli V–VIII* (Spoleto: Presso la sede del Centro, 1995), 808–10.

faithful.¹⁹ The early Church embraced this understanding as well. Confronting the wrongdoer in love, the *denunciatio evangelica*, would remain in the canon law for centuries to come.²⁰ Various passages in the New Testament admonish the Christian judge, pastor and arbiter, to remember he would be judged more strictly than the rest.²¹ Equally, the congregation was reminded they were subject not only to their pastor's judgment but also to the secular laws.²²

After the apostolic period, it does not appear that either the procedure of the *denunciatio evangelica* or the bishop's role as 'pastoral judge' appreciably changed. While 'rule-making' was already evident in the New Testament, and remained a feature in the second and third centuries, thanks to the development of the diocesan system, the law of the Church remained essentially pastoral. The third-century *Didascalia apostolorum* describes the bishop as a mediator. Any punishment was intended to restore the penitent if at all possible. An actual hearing, with clergy present, was a last resort.²³

We move now to the fourth century. Constantine granted numerous legal privileges to Christians, especially their bishops and priests.²⁴ Within a few years of defeating his rivals, the emperor established the clerical *privilegium fori*, which would expand over the course of the century.²⁵ Already in his

-
- 19 Mathias Schmoeckel, "Procedure, Proof, and Evidence," in *Christianity and Law: An Introduction*, ed. John Witte, Jr. and Frank S. Alexander (Cambridge: Cambridge University Press, 2008), 143–45. See also Zeev W. Falk, "'Words of God' and 'Judgments,'" in *Studi in onore di Edoardo Volterra*, 6 vols. (Milan: Casa Editrice dott. A. Giuffrè, 1971), 6.155–59.
 - 20 On the *denunciatio evangelica* in later canon law, Gratian, the decretists, and decretalists, Charles Lefebvre, "Contribution à l'étude des origines et développement de la denunciatio evangelica," *Ephemerides iuris canonici* 6 (1950): 60–93.
 - 21 Schmoeckel, "Procedure, Proof, and Evidence," 147.
 - 22 Schmoeckel, "Procedure, Proof, and Evidence," 146–47, arguing also that eschatological expectation in the early Church may have contributed to this view. Romans 13 is the classic text.
 - 23 Jill Harries, "Resolving Disputes: The Frontiers of Law in Late Antiquity," in *Law, Society, and Authority in Late Antiquity*, ed. Ralph W. Mathisen (Oxford: Oxford University Press, 2001), 73.
 - 24 Hartmann, "Der Bischof als Richter," 810–11. Most of what we know has to be gleaned from the imperial codes. There are only a few surviving documents from imperial officials and a single, fragmentary original of a rescript, on which see Peter Classen, "Spätromische Grundlagen mittelalterlichen Kanzleien," in *Ausgewählte Aufsätze von Peter Classen. Unter Mitwirkung von Carl Joachim Classen und Johannes Fried*, ed. Josef Fleckenstein (Jan Torbecke Verlag: Sigmaringen 1983), 77. On evidence from Roman Egypt, Metzger, "Roman Judges," 14, discussing also relevant secondary literature.
 - 25 Mousourakis, *Historical and Institutional*, 367.

reign, we see the first evidence of the bishop's court, the *audientia episcopalis*.²⁶ Imperial laws not only ensured the bishop's exclusive right to judge cases among Christians but also allowed him to hear appeals and even arbitrate secular disputes.²⁷ It remains unclear, however, whether both parties had to agree on an appeal.²⁸

There were many reasons why Constantine and his successors enlarged the bishop's jurisdiction. Piety and patronage undoubtedly played a role. From the emperor's perspective, there were practical benefits as well for encouraging litigants to seek the bishop's court. Some scholars have argued this was a conscious effort to reduce the press of litigation in secular courts. Others have viewed the emperor's promotion of the *audientia episcopalis* as an attempt to direct cases away from corrupt secular judges.²⁹ Of the two, among many other explanations, the first is particularly persuasive. Since the bishop was

-
- 26 A.J.B. Sirks, "The *episcopalis audientia* in Late Antiquity," *Droit et cultures* 65 (2013), accessed at <http://droitcultures.revues.org/3005> on 20 May 2014. See also, among many studies, John C. Lamoreaux, "Episcopal Courts in Late Antiquity," *Journal of Early Christian Studies*, 3.2 (1995): 143–67, Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999). Older works include M.R. Cimma, *L'Episcopalis audientia nelle costituzioni imperiali da Costantino a Giustiniano* (Turin: Giappichelli, 1989), Wolfgang Waldstein, "Zur Stellung des Episcopalis audientia im spätrömischen Prozeß," in *Festschrift für Max Kaser zum 70. Geburtstag*, ed. Dieter Medicus and Hans Hermann Silber (Munich: Beck, 1976), 533–56, Theodor Klauser, "Bischöfe auf dem Richterstuhl," *Jahrbuch für Antike und Christentum* 5 (1962): 129–74, and G. Vismara, *Episcopalis audientia, l'attività, giurisdizionale del vescovo per la risoluzione delle controversie private tra laici nel diritto romano e nella storia del diritto italiano fino al secolo nono* (Milan: Società Vita e pensiero, 1937).
- 27 Lamoreaux, "Episcopal Courts," 146–47, also, on the disputed *Constitutio Sirmondiana* (331–333), Sirks, "The *episcopalis audientia*," arguing against its authenticity. On the early claims of papal primacy and the development of Rome as both appellate and final court, among many studies, Hubert Mordek, "Der römische Primat in den kirchenrechtssammlungen des Westens vom iv. bis viii. Jahrhundert," *Il primato del vescovo di Roma nel primo millennio*, ed. Michele Maccarrone (Vatican City: Libreria Editrice Vaticana, 1998), 523–66.
- 28 Sirks, "The *Episcopalis audientia*," and Waldstein, "Zur Stellung des Episcopalis audientia," 541.
- 29 Sirks, "The *episcopalis audientia*." That much of the legislation prior to the *Theodosian Code* should not be read as general pronouncements on the bishop's legal power and authority but, instead, understood as 'specific responses to circumstances thrown up by courtroom practice,' Caroline Humfress, "Bishops and Law Courts in Late Antiquity: How (Not) to Make Sense of the Legal Evidence," *Journal of Early Christian Studies* 19.3 (2011): 375–400.

considered an arbiter from whom no appeal could be made, cases sent to his court would have lightened the load of the magistrates.³⁰

There is ample evidence that both Christians and pagans came to the bishop's seat.³¹ One reason why litigants, regardless of religious beliefs, sought his judgment was the inherent violence of secular procedure.³² The *audientia* must have been a welcome alternative to torture and capital punishment, though occasionally blood was still shed. (Augustine once had a cleric who had raped a nun whipped.)³³ The bishop's arbitration was undoubtedly attractive for those lacking time and funds to engage in extended litigation.³⁴ For their part, some bishops, including Augustine himself, did not welcome these additional duties.³⁵ Others, however, were eager to sit in judgment, and attempted to use their position to gain power and influence.³⁶

30 Lamoreaux, "Episcopal Courts," 151–52, noting the how multiple appeals slowed down process; this problem was a concern—particularly in light of their abuse—we also shall find in the *ordines*; he also notes the burdensome and unfair demands of gifts (*sportulae*) by litigants to all officials of the court. They were originally a patron's gift to a client, on which see http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Sportula.html accessed on 16 June 2012. For additional discussion of *sportulae* and corruption, Harald Siems, "Bestechliche und ungerechte Richter in frühmittelalterlichen Rechtsquellen," in *La giustizia nell'alto medioevo, secoli V–VIII* (Spoleto: Centro italiano di studi sull'alto Medioevo, 1995), 512–13, 519–20.

31 Lamoreaux, "Episcopal Courts," 148, 150–51.

32 Lamoreaux, "Episcopal Courts," 162. Discussing Cyprian's comments on torture in the Roman courts, Kenneth Pennington, "Torture in the *Ius Commune*," in *Mélanges Anne Lefebvre-Teillard*, 817. For torture considered in the *ordines*, see chapter 5 for the *Ordo Bambergensis*.

33 At another time, however, Augustine did not order renegade slave traders to be tortured. See Noel Lenski, "Evidence for the *Audientia episcopalis* in the New Letters of Augustine," in R. Mathisen, ed. *Law, Society and Authority in Late Antiquity* (Oxford: Oxford University Press, 2001), 94, and in the same volume Leslie Dossey, "Judicial Violence and the Ecclesiastical Courts in Late Antique North Africa," 98–114, noting examples of episcopally-sanctioned corporeal punishments against both lay and clergy, including the heretical Donatists.

34 Lamoreaux, "Episcopal Courts," 155.

35 Lamoreaux, "Episcopal Courts," 145, noting Augustine's frustration. Compare also Waldstein, "Zur Stellung des Episcopalis audientia," 555.

36 Erika T. Hermanowicz, "Catholic Bishops and Appeals to the Imperial Court: A Legal Study of the Calama Riots in 408," *Journal of Early Christian Studies* 12.4 (2004): 481–521, also Hartmann, "Der Bischof als Richter," 811, noting Hilary of Poitiers's complaints about worldly bishops.

What took place in the *audientia episcopalis* remains unclear. From councils, as early as Serdica in 343, we know that bishops discussed procedure.³⁷ Serdica treated appeal at some length.³⁸ There was, however, no attempt to standardize practice. Even if there is evidence that, by century's end, the secular *cognitio extra ordinem* shaped the *audientia*, the bishop essentially remained an arbiter.³⁹ How he judged was not fixed in writing, even if we do have some evidence of written statements and oaths from the parties.⁴⁰ Thus, when Augustine invoked the 'judicial order' in a sermon he was not referring to some sort of procedural code.⁴¹ He meant respect for good order and authority.⁴²

There was no standardized legal education for a bishop. Formal study of the canons lay centuries in the future. As for the secular law, most bishops would have received some exposure to it through their rhetorical education, part of the classical *trivium*.⁴³ Many possessed a good deal of general, and sometimes technical, legal knowledge.⁴⁴ Some had gained this from their secular careers prior to entering the priesthood. Ambrose of Milan is a good example. From letters discovered four decades ago, we find as well that Augustine both gave legal advice and sought counsel from an advocate concerning a civil dispute.⁴⁵ Bishops could appoint someone to hear the case and request leading members

-
- 37 Hess, *The Early Development of Canon Law*, 60–61 and 46, on the legislation of an earlier council at Elvira.
 - 38 Hess, *The Early Development of Canon Law*, 186–200.
 - 39 Brundage, *Medieval Origins*, 42–43.
 - 40 Lamoreaux, "Episcopal Courts," 156–57, Schmoeckel, "Procedure, Proof, and Evidence," 148.
 - 41 Augustine, *Sermo* 351, (PL 39.1545–47), on which see Fowler-Magerl, *Ordo iudiciorum*, 14–15.
 - 42 Lenski, "Evidence for the Audientia episcopalis," 83–84.
 - 43 The other parts being grammar and dialectic, elementary logic. For a concise treatment of education in the period, Averil Cameron, *The Later Roman Empire* (Cambridge, MA: Harvard University Press, 1993), 152–54.
 - 44 Robert Kaster, *The Guardians of Language* (Berkeley and Los Angeles: The University of California Press, 1988), also Lamoreaux, "Episcopal Courts," 159 and Lenski, "Evidence for the Audientia episcopalis," 87, and 90, noting that Augustine understood the concept of *actio in rem*, something that will be considered as well by some of our *ordines*.
 - 45 Lenski, "Evidence for the Audientia episcopalis," 85, also L. Claude Lepelley, "Liberté, colonat et esclavage d'après la Lettre 24*," la juridiction épiscopale 'de liberi causa,' in *Les lettres de Saint Augustin découvertes par Johannes Divjak* (Turnout: Brepols, 1983), 329–42, and Lamoreaux, "Episcopal Courts," 159. See also Detlef Liebs, *Die Jurisprudenz im spätantiken Italien (260–640 nach Christus)*, (Berlin: Duncker and Humblot, 1987), 100–04 for additional discussion of Augustine, from sermons and other sources, and his views on the jurists.

of the community for assistance.⁴⁶ This extended the bishop's access to legal expertise as well as his network of patronage.

The *audientia* was not confined to spiritual matters. From arguments concerning inheritance and property to violence towards women, the bishop's court was anything but removed from the world.⁴⁷ How clergy were tried varied according to office,⁴⁸ a practice observed as well at the secular courts, where the procedures and punishments pertaining to elite and common, the *honestiores* and *humiliores*, differed.⁴⁹ Sometimes lower clergy also sued their superiors to influence or shame them.⁵⁰

Despite the apparent willingness, even enthusiasm, demonstrated by the imperial government and its citizens to turn to the ecclesiastical courts, there was always friction between secular and sacred jurisdictions. The Roman law was not easily adaptable to the ideals and practices of the Church. While secular law could accept the bishop as an arbiter, his authority and power clearly differed from those possessed by laymen.⁵¹ His status was uncertain.⁵² Jurisdictions between secular and ecclesiastical courts also were often indistinct, which could lead to conflict and unjust decisions.⁵³ Perhaps this is why, by the late fourth century, emperors began to restrict some of the bishop's judicial powers.⁵⁴ The consent of both parties was now required for judgment by

46 Lamoreaux, "Episcopal Courts," 160–61.

47 Lamoreaux, "Episcopal Courts," 161.

48 Jane Merdinger, "Malfeasance and Misdemeanors in St. Augustine's North Africa," in *Proceedings Washington*, 7 and n. 14, noting the two-tiered justice system in the late antique African church: rules for lower clergy, rules for bishops. Bishops were judged by twelve colleagues and also could appeal to Rome.

49 Mousourakis, *Historical and Institutional*, 134.

50 Harries, "Resolving Disputes," 70, on social and legal strategies. On bishops' abuse of their office, Annick Martin, "L'image de l'évêque à travers les 'Canons d'Athanase': Devoirs et réalités," in *L'évêque dans la cité. Image et autorité. Actes de la table ronde (Rome 1^{er}–2 décembre 1995)*, ed. Éric Rebillard, Claire Sotinel (Rome: Collection de l'École française de Rome, 1998), 59–70.

51 On influential laymen serving in a legal capacity, for example as suretors, Karin Nehlsen-von Stryk, *Die boni homines des frühen Mittelalters unter besonderen Berücksichtigung der fränkischen Quellen* (Berlin: Duncker and Humblot, 1981), 256–85 and 326.

52 Emphasized by Harries, "Resolving Disputes," 74–75, 79.

53 Lenski, "Evidence for the Audientia episcopalis," 96. Such blurring of jurisdictions also will challenge the *ordines* of the twelfth century.

54 At the same time, the papacy was advancing legal claims, for example in matters of appeal and the right to hear important cases (*causae maiores*). These were made through decretals, the papal letters. Among many studies, Detlev Jaspers and Horst Fuhrmann, *Papal Letters in the Early Middle Ages* (Washington: Catholic University of America Press, 2001).

the bishop.⁵⁵ The Emperor Honorius declared that the bishop's judgment was only arbitration, and not to be confused with secular judgment. Purely civil disputes were now to be heard exclusively by the imperial courts.⁵⁶ Elsewhere, the *Theodosian Code* (*Cod. Th.* 16.2.23) declared that ecclesiastics did not have to attend the secular court. However, it also made an exception: priests accused of criminal acts.⁵⁷ This will be the vital issue centuries later in the conflict between Archbishop Thomas Becket and King Henry II of England, a conflict forming the backdrop to the *ordines* of the late twelfth century we shall examine.

The civil laws of the fifth and sixth centuries provide information about ecclesiastical procedure, at least from the emperor's viewpoint. The ecclesiastical forum is treated in all the major collections, and ultimately, Justinian's *Corpus iuris civilis*.⁵⁸ They focus on the bishop's jurisdiction. None, however, reserved a discrete place for all ecclesiastical process.⁵⁹

The ecclesiastical councils of late antiquity, and the early canonical collections that transmitted their canons, provide information about procedure.⁶⁰ They defend the separate sphere of the ecclesiastical court and threaten those, presumably clerics, who might consider turning to a secular judge in hopes of a better settlement, for example, due to family ties or relationships established

55 Mousourakis, *Historical and Institutional*, 375.

56 Lamoignon, "Episcopal Courts," 148–49.

57 On this text and its later manipulation by Archbishop Hincmar of Rheims in the ninth century, Charles West, "The Significance of the Carolingian Advocate," *Early Medieval Europe* 17.2 (2009): 189 and n. 16.

58 On the bishop in the *Theodosian Code*, John F. Matthews, *Laying Down the Law: A Study of the Theodosian Code* (New Haven and London: Yale University Press, 2000), 94–95, 160–61, treating the *Sirmondian Constitutions*, also Angelo di Berardino, "L'immagine del vescovo attraverso i suoi titoli nel codice teodosiano," in *L'Évêque dans la cité*, 35–48, noting the Code's failure to treat the bishop's civil legal function. The older view maintained by some that Justinian made all ecclesiastical legislation a part of his civil law—that there was a virtual identity of the two laws—has been persuasively challenged by Thomas Rufner, "Die gesetzgleiche Geltung des kanonischen Rechts in der Spätantike," *ZRG KA* 96 (2010): 1–37, noting that Nov. 131.1 treated only legislation up to the Council of Chalcedon—above all the canons of the four ecumenical councils—and not all ecclesiastical legislation.

59 See, for example Litewski, *Zivilprozeß*, 15. On the importance of the *Institutes* for procedure, though mostly treating actions, Metzger, "Roman Judges," 4.

60 The fundamental guide is Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400–1140). A Bibliographical Guide to the Manuscripts and Literature* (Washington, D.C.: Catholic University of America, 1999).

through patronage.⁶¹ In the special case of bishops having to deal with heretics in the secular court, for heretics threatened both church and state, they were allowed to appoint procurators to represent them.⁶² Canons treat certain legal responsibilities pertaining to the bishop, notably his protection of the poor and weak and jurisdiction over clergy.⁶³ He continued to be exhorted to arbitrate in the hopes of achieving a compromise.⁶⁴ How this was to be accomplished, however, was not defined.⁶⁵

This lack of prescription in procedure highlighted a fundamental principle found in the earliest canon law: ‘non-contradiction.’ Unlike modern, secular legal systems open to change through to new statutes or precedents, one could not simply dismiss a decree of an earlier council in favor of a more recent decision at another meeting or a letter sent by a pope. As an ancient maxim

-
- 61 *Registri ecclesiae carthaginensis excerpta* (the seventeenth Council of Carthage, fifth century), in *Concilia Africae*, a. 345–a. 525, ed. Charles Munier (Turnhout: Brepols, 1974), 218.1242–1246: De his qui publicorum iudiciorum cognitionem ab imperatore poposcerint. Placuit ut quicumque ab imperatore cognitionem publicorum iudiciorum petierit, honore proprio priuetur; si autem episcopale iudicium ab imperatore postularit, nihil ei obsit. (Concerning those who seek a hearing of public judges from the emperor. It is fitting that whosoever should seek hearing of public judges from the emperor be deprived of his own honor; if, however, he has sought episcopal judgment from the emperor, let nothing harm him in doing so.)
- 62 A Carthaginian canon preserved by Fulgentius Ferrandus, *Breviatio canonum*, c. 44, in Munier, *Conciliae Africae*, 291: Ut liceat unicuique episcopo procuratores constituere, quando de iudiis publicis contra haereticos aliquid est petendum. (That each and every bishop be permitted to appoint procurators whenever something is required from him in public trials against heretics.) On the *Breviatio*, compiled at Carthage probably around 550, Kéry, *Canonical Collections*, 23–24. For more on proctors with respect to the Carolingian *advocatus*, see below.
- 63 Hartmann, “Der Bischof als Richter,” 813–14, noting the decree at the Council of Chalcedon (451).
- 64 For example, the *Statuta ecclesiae antiquae*, c. 54 (XXVI) in *Concilia galliae*, a. 3140a. 506, ed. Charles Munier (Turnhout: Brepols, 1963), 175. 137–139: Studendum episcopo ut dissidentes fratres, siue clericos, siue laicos, ad pacem magis quam ad iudicium cohortetur. (The bishops should strive to urge dissenting brothers, whether clergy or lay, towards peace, not judgment.) On the *Statuta ecclesiae antiquae*, composed ca. 500 AD in southern France, perhaps at Arles, Kéry, *Canonical Collections*, 7.
- 65 Hartmann, “Der Bischof als Richter,” 815–16. Hartmann provides an example of limits in canon 14, which states that the bishop could not hear a case without his clergy being present. See the fifth-century *Statuta ecclesiae antiqua*, which presented blocks of canons commenting on the duties, and limits—at least with respect to his clergy—of the bishop as judge.

put it, the canons, provided they were authentic, were 'diverse, not adverse'.⁶⁶ Accordingly, all sacred texts were potential sources for theory and practice; this 'open' nature of canon law would persist for centuries.⁶⁷ Only with the advent of the scholastic method would a dialectical hermeneutic attempting to solve these contradictions begin to appear.⁶⁸ Thus, for centuries, there would be no normative text, or series of texts, to fix proper procedure in the ecclesiastical court.

While scholars debate the degree to which Roman law continued to be understood and used in the early-medieval West, it unquestionably survived, if incompletely, in southern Europe. The assumption that the invaders clung to their own laws has been effectively challenged and, given the evidence that those learned in Roman law counseled the early Germanic kings, these may have been far more receptive to the Roman legal tradition than assumed by older scholarship.⁶⁹ Testaments retained Roman terms and forms.⁷⁰ Law provided a bulwark to protect the rights and properties of the elite. Here, the specialized terms of Roman law in formularies provided valuable support.⁷¹

66 Among various studies, Henri de Lubac, "A propos de la formule: 'Diversi, sed non adversi,'" *Recherches de science religieuse* 40 (1951–1952): 27–40 and, for the period of the *ordines*, Herbert Kalb, "Non adversi, sed diversi. Konfligierende Rechtsquellen und die Dekretistik am Beispiel Stephans von Tournai," *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 105 (1997): 346–60.

67 In the sense employed by H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1963): 124–32.

68 See chapter 1.

69 P.S. Barnwell, "Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West," *Past and Present* 168 (2000): 6–29, also Sean D.W. Lafferty, *Law and Society in the Age of Theoderic the Great. A Study of the Edictum Theoderici* (Cambridge: Cambridge University Press, 2013), 116–18, treating the *audientia* of bishops in Theodoric's realm and clerics choosing royal jurisdiction over papal, about which Gelasius I complained in a letter of 496.

70 Nathaniel L. Taylor, "Testamentary Publication and Proof and the Afterlife of Ancient Probate Procedure in Carolingian Septimania," in *Proceedings Syracuse*, 767, 772. On the 'decorative' nature of Roman law in the formularies, Alice Rio, "Formulae, Legal Practice and the Settlement of Disputes in the Frankish Kingdoms: The Formulary of Angers," in *Law Before Gratian. Law in Western Europe c. 500–1100. Proceedings of the Third Carlsberg Academy Conference on Medieval Legal History, 2006*, ed. Per Andersen et al. (Copenhagen: DJØF Publishing, 2007), 27.

71 Alice Rio, *Legal Practice and the Written Word in the Early Middle Ages* (Cambridge: Cambridge University Press 2009), 208.

The 'law-making' of the early-medieval barbarian kingdoms 'replicated an archetypal function of Roman imperial sovereignty.'⁷²

The passage of time did not appreciably change the bishop's legal power. He remained, first and foremost an arbiter, if one with considerable power, both formal and informal, at his disposal.⁷³ If sufficiently literate and supported by a trained staff and adequate library, he had numerous laws, both secular and sacred, to guide him. However, this body of law remained unfixed, as noted above, an 'open' system circulating maxims and rules.⁷⁴ From these, the bishop could choose what best fit the circumstances.⁷⁵ Without schools, jurists, and codes to regulate the boundaries and content of procedural law,⁷⁶ the division between secular and sacred law remained blurred and sometimes contested.⁷⁷

The letters of Pope Gregory the Great give some insight into ecclesiastical procedure in the early Middle Ages.⁷⁸ Like Augustine before him, Gregory invokes *ordo iudicis* and *ordo iudiciarius*; however, he provides more detail. This is particularly evident in his letters written concerning the appeal of a Spanish bishop who claimed he had been unfairly deposed,⁷⁹ After emphasizing the need for the trial to be legally conducted,⁸⁰ Gregory notes that the plaintiff and witness must be different, with the latter having to take an oath as well. The trial must take place in the presence of all parties.⁸¹ In these letters

72 Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century. Legislation and its Limits* (Oxford: Wiley Blackwell, 1999, rp. 2001), 64.

73 Edward James, "Beati pacifici: Bishops and the Law in Sixth-Century Gaul," in *Disputes and Settlement. Law and Human Relations in the West*, ed. John Bossy (Cambridge: Cambridge University Press, 1983), 25–46.

74 Maurizio Lupoi, *The Origins of the European Legal Order*, tr. Adrian Belton (Cambridge: Cambridge University Press, 1999), 431–32.

75 Lupoi, *The Origins of the European Legal Order*, 432.

76 An excellent overview is provided by Brundage, *Medieval Origins*, chapter two, 'Law without Lawyers.'

77 Lupoi, *The Origins of the European Legal Order*, 436.

78 For a recent discussion, Antonio Padoa-Schioppa, "Grégoire le Grand dans son rôle de juge," in *Mélanges d'Anne Lefebvre-Teillard*, 801–12, treating themes in the letters such as mercy, impartiality, and the distinction between divine and human laws.

79 Fowler-Magerl, *Ordo*, 10, and most recently, Caitlin Stapleton, "The Legal Legacy of Pope Gregory I: In Life and in Letters," 9 *Ave Maria Law Review* (2011): 303–33. The letter was written to the Defensor John. The *Defensor* was an office created in the fourth century whereby the emperor appointed a magistrate to act on behalf of the urban poor. See Berger, *Encyclopedic Dictionary*, 428.

80 The term is *ordinabiliter*. See Gregory the Great, (Lib. xiii, Ep. 74 in *MGH Epistolae* 2.411).

81 Fowler-Magerl, *Ordo*, 10 and nn. 21–25, with reference to the letters.

and elsewhere,⁸² he referred to both the *Codex* and *Digest*.⁸³ While Gregory never provided anything like a thorough treatment of the *audientia episcopalis*, his letters did build a bridge to convey procedural texts and concepts from Antiquity to the Middle Ages.⁸⁴

Roman procedure was preserved, if only in piecemeal fashion, in Bishop Isidore of Seville's *Etymologies*, the seventh-century encyclopedia of secular and sacred knowledge.⁸⁵ In book two, Isidore considers legal process under the rubric of forensic rhetoric;⁸⁶ later, in book five, he defines terms like the law of nations (*ius gentium*), along with witnesses and legal instruments, for example testaments.⁸⁷ He briefly treats mandate, pact, possession, and inheritance.⁸⁸ His survey of the civil law was, however, scarcely adequate. For example, he never treats the stages of the trial. The *Etymologies* offer a very incomplete dictionary, not a procedural treatise.⁸⁹

While they describe procedure neither fully nor in detail, there are other legal texts from the early Middle Ages that consider the bishop's jurisdiction.⁹⁰ That jurisdiction was founded upon worldly wealth and patronage, coupled with religious authority and power. Behind him stood as well the sainted

-
- 82 See Ignacio Pérez de Heredia y Valle, "Die Ablehnung des kirchlichen Richters im Frühmittelalter," in *Iuri Canonico Promovendo. Festschrift für Heribert Schmitz zum 65. Geburtstag*, ed. Winfried Amans, et al. (Regensburg: Verlag Friedr. Pustet, 1994), 678–79.
 - 83 Stapleton, "The Legal Legacy," 317, counting 74 direct and 54 implicit citations. On the *Digest*, Wolfgang P. Müller, "The Recovery of Justinian's Digest in the Middle Ages," *BMCL* NS 20 (1990): 1 and n. 1. On jurists still working in Gregory's Rome and also the pope's reference to the *Digest*, Liebs, *Die Jurisprudenz*, 127–29.
 - 84 Linda Fowler-Magerl, "The Use of the Letters of Pope Gregory I in Northeastern France and Lorraine before 1100," in *Ins Wasser geworfen und Ozeane durchquert. Festschrift für Knut Wolfgang Nörr*, ed. Mario Ascheri, et al. (Cologne, Weimar: Böhlau, 2003), 237–60.
 - 85 *Isidori hispalensis episcopi. Etymologiarum sive originum, libri xx*, 2 vols., ed. W.M. Lindsay (Oxford: Clarendon 1911, rp. 1962).
 - 86 See Wormald, *The Making of English Law*, 467. The Latin text may be found at http://penelope.uchicago.edu/Thayer/L/Roman/Texts/Isidore/2*.htm accessed on 13 May 2015.
 - 87 *Etymologiarum sive originum*, 5,23–24.
 - 88 *Etymologiarum sive originum*, 5,24.
 - 89 Compare also the later work by Alcuin of York, *Dialoga de rhetorica et virtutibus* (PL 101.919–949). Among many studies, Wolfgang Edelstein, *Eruditio und Sapientia Weltbild und Erziehung in der Karolingerzeit. Untersuchungen zu Alcuins Briefen*, (Freiburg im Breisgau: Verlag Rombach, 1965).
 - 90 For Visigothic Spain, particularly after its conversion to Catholicism, Hartmann, "Der Bischof als Richter," 925–32, also his essay "Der Bischof als Richter. Zum geistlichen Gericht über kriminelle Vergehen von Laien im früheren Mittelalter," *Römische Historische Mitteilungen* 28 (1986): 106.

bishops who had governed his see.⁹¹ (We should not forget that the saints themselves were viewed as intercessors at the heavenly court as well.)⁹² Despite these resources, his legal authority was often challenged. A good example is the sanctuary his church was supposed to guarantee.⁹³ Ideally, this would provide safety and sufficient time for him to intervene and, ideally, restore peace between a fugitive and those who, rightly or wrongly, sought vengeance. Reality was another matter. Bishop Gregory of Tours reveals in his sixth-century *History of the Franks* that sanctuary was all too often violated by those willing to defy the bishop's power and risk the wrath of the saints.⁹⁴

We find instances of secular government pushing back against the clergy and their bishop. A royal synod held in 517 at Epao permitted laymen to accuse clergy and demanded an ecclesiastical penalty for criminal clergy.⁹⁵ In response, bishops sought to defend and expand their legal power. Ecclesiastical councils in Francia for the remainder of the sixth century and beyond opposed such royal restrictions and demanded that clergy be protected from secular legal harassment and violence and cases be heard only by their bishop.⁹⁶ Some bishops also claimed the right to hear purely secular disputes between laymen.⁹⁷ Conflicting claims over jurisdiction would only grow over time.⁹⁸

91 On the persistence and transformation of Roman governance in Merovingian Francia, Alexander Callander Murray, "Pax et disciplina: Roman Public Law and the Merovingian State," in *Proceedings Syracuse*, 269–85. See also Hartmann, "Der Bischof als Richter," 836–37 and "Zum geistlichen Gericht," 106, discussing Gregory of Tours.

92 Geoffrey Koziol, *Begging Pardon and Favor: Ritual and Political Order in Early Medieval France* (Ithaca and London: Cornell University Press, 1992), 85.

93 Among many studies, Rob Meens, "Sanctuary, Penance, and Dispute Settlement under Charlemagne: The Conflict between Alcuin and Theodulf of Orléans over a Sinful Cleric," *Speculum* 82.2 (2007): 281–82, also 297 arguing for sanctuary as a means of dispute resolution and 'control on local violence.'

94 Hartmann, "Zum geistlichen Gericht," 108 and James, "Beati pacifici," 36–43.

95 Hartmann, "Der Bischof als Richter," 817. Epao reminds us that the problem of "criminous clerics" was around long before Becket and the twelfth century.

96 For example the Council of Mâcon held in 585, on which see Hartmann, "Der Bischof als Richter," 818–19.

97 Hartmann, "Der Bischof als Richter," 819–20, citing canon 14 of the Synod of Clermont (535), which threatened to excommunicate anyone who stole ecclesiastical property, a threat later extended by early seventh century councils against anyone who abused widows and orphans.

98 Hartmann, "Der Bischof als Richter," 823. That secular law continued to recognize the *privilegium fori*, even if it was sometimes honored in the breach, Peter Landau, "Kanonesammlungen in Bayern in der Zeit Tassilos III. und Karls des Großen," in

The forgeries attributed to “Pseudo-Isidore” were the most lasting contribution to procedure from the Carolingian period. That these forged papal letters and conciliar canons exerted an enormous influence over later canon law and, beginning with the Investiture Contest, papal administrative and legal power needs no extended treatment here.⁹⁹ Procedural issues abound throughout the forgeries, for example in the *Capitula Angilramni* and the *Benedictus Levita*.¹⁰⁰ Suffragan bishops chiefly concerned the forgers, who sought to defend them against both their ecclesiastical superiors and those beneath them, lesser clergy and laymen.¹⁰¹ They did this in various ways, for example by inventing exceptions to delay and frustrate the metropolitan’s judgment and, if these failed, fashioning new ways to appeal to distant Rome.¹⁰² They invoked the *ordo iudiciarius* by declaring that ancient authorities had demanded an

Regensburg, Bayern und Europa. Festschrift für Kurt Reindel zum 70. Geburtstag, ed. Lothar Kolmer and Peter Segl (Regensburg: Universitätsverlag, 1995), 137–38.

- 99 Fundamental is Horst Fuhrmann, *Einfluß und Verbreitung der pseudoisidorischen Fälschungen von ihrem Auftauchen bis in die neuere Zeit*, 3 vols. (Stuttgart: Anton Hiersemann, 1972–1974). An important, recent study is provided by Eric Knibbs, “The Interpolated Hispana and the Origins of Pseudo-Isidore,” *ZRG KA* 130 (2013): 1–71. For modern editions and scholarly commentary, see also <http://www.pseudoisidor.mgh.de/> accessed on 31 May 2014. Briefly discussing the forgeries’ influence, Brundage, *Historical Introduction*, 64–66 and, more extensively Klaus Zechiel-Eckes, “Ein Blick in Pseudoisidors Werstatt: Studien zum Entstehungsprozess der Falschen Dekretalen: Mit einem exemplarischen editorischen Anhang (Pseudo-Julius an die orientalische Bishöfe, JK 196),” *Francia: Forschungen zur westeuropäischen Geschichte* 28 (2001): 37–90.
- 100 The *Capitula Angilramni* were forged synodical decrees supposedly sent by Pope Hadrian I to Bishop Angilram of Metz. For a concise introduction to this part of the Pseudo-Isidorian corpus, “almost all dealing with the process of accusation against clerics, particularly bishops,” Fuhrmann and Jasper, *Papal Letters*, 149–50 and, more specifically, Karl-Georg Schon, *Die Capitula Angilramni. Eine prozessrechtliche Fälschung Pseudoisidors* (Hannover: Hahnsche Buchhandlung, 2006). A provisional edition is available online at http://www.pseudoisidor.mgh.de/html/capitula_angilramni.html accessed on 14 July 2015. The *Benedictus Levita* supposedly preserved authentic capitularies, on which see, again, Fuhrmann and Jasper, *Papal Letters*, 143. A provisional online edition of *Benedictus Levita* may be found at <http://www.benedictus.mgh.de/haupt.htm> accessed on 14 July 2015. For evidence of other forged canons involving procedure, see Wilfried Hartmann, *Kirche und Kirchenrecht um 900. Die Bedeutung der spätkarolingischen Zeit für Tradition und Innovation im kirchlichen Recht* (Hannover: Hahnsche Buchhandlung, 2008), 134–36.
- 101 Fuhrmann and Jasper, *Papal Letters*, 142, also Fowler-Magerl, *Ordo*, 13–16, and among many other studies, Heredia y Valle, “Die Ablehnung,” 688–89.
- 102 A particularly important exception advanced by the forgers was the *exceptio spoli*, which demanded restitution of seized property before a trial. See Fuhrmann, *Einfluß und Verbreitung*, 1.42–44.

open trial for clergy, especially bishops.¹⁰³ Elsewhere, immunity from any civil judgment was granted to all clergy, including monks and women in religious life. We find as well a declaration that the 'life of those making the accusation first had to be discussed,' a clear indication that even charging a cleric was not going to be easy.¹⁰⁴ As if these forged capitularies were not enough of a warning to potential accusers, we find another text declaring that anyone who 'frequently sues not be received in court without examination.'¹⁰⁵

There were practical reasons why the forgers wanted to prevent, or at least hinder, their accusation and prosecution. When summoned by his archbishop, a bishop wanted ample time to mount his defense. No less important was the need to have his office and its possessions be restored if he had been deposed. A bishop wanted his day in court, and not be tried *in absentia*. He expected his accuser and witnesses to be carefully examined.¹⁰⁶ Such concerns, driven by the self-interest of clerics in ninth-century Francia, would later figure in the Church's procedural law thanks to the forgeries' reception by later canonical collections and, ultimately, Gratian's *Decretum*.¹⁰⁷

No Frankish bishop in the ninth century was more powerful, more sure of his legal authority and power, than Hincmar of Rheims. Hincmar contributed to procedural law in various works that would pass down to later canon law. His letters reflected an exalted view of the metropolitan office.¹⁰⁸ He challenged the clerics ordained by his defiant nephew, Bishop Hincmar of Laon,

103 On the bishops' agenda, Hartmann, "Zum geistlichen Gericht," 111.

104 Respectively at *Benedictus Levita* 1.378 and 393, accessed at <http://www.benedictus.mgh.de/haupt.htm> on 14 July 2015.

105 *Benedictus Levita*, 1.397, accessed at <http://www.benedictus.mgh.de/haupt.htm> on 14 July 2015.

106 These points are treated by Fowler-Magerl, *Ordo*, 15–16.

107 None of the Carolingian canonical compilations had a section dedicated to procedure. Canons were gathered, and preserved, but thematic organization lay in the future. A good example is book four of the *Quadripartitus*, which treats 'de diversis peccatis et criminibus eorumque indiciis ac satisfactionibus.' (Concerning various sins and crimes, and their proof/evidence and penalties.) See Franz Kerff, *Der Quadripartitus. Ein Handbuch der karolingischen Kirchenreform. Überlieferung, Quellen und Rezeption* (Sigmaringen: Jan Thorbecke Verlag, 1982), 12–13.

108 Archbishop of Rheims in the middle of the ninth century, he was a formidable figure in the Carolingian world, and a staunch defender of his archdiocese and prerogatives. For Hincmar's views on his legal power over clerics and also the distinction between his jurisdiction and secular laws, Abigail Firey, *A Contrite Heart: Prosecution and Redemption in the Carolingian Empire* (Leiden and Boston: Brill, 2009), chapter one, treating also the affair of Ebbo and his clerics and the divorce of Teutberga.

and declared that even in manifest crimes he could convict and condemn without trial.¹⁰⁹ Even a Frankish king could feel his wrath.¹¹⁰

Like the clergy of Late Antiquity, none of these men was formally trained in the law. Legal texts were first encountered in the *trivium*'s grammar and rhetoric.¹¹¹ One remarkable feature of the so-called 'Carolingian Renaissance' is the number of surviving texts, for example glossaries, designed to instruct and aid the student.¹¹² These sometimes were appended to legal texts.¹¹³ Another example of how rhetorical instruction might convey some knowledge of procedure is evident in glossed manuscripts of Isidore of Seville's *Etymologies*,

109 On Hincmar's *Opusculum LV capitulorum*, Rudolf Schieffer, *Die Streitschriften Hinkmars von Reims und Hinkmars von Laon, 869–871* (Hannover: Hahnsche Buchhandlung, 2003), also Hincmar's extensive discussion of how criminal clergy should be treated, in *De presbiteris criminosis: Ein Memorandum Erzbischof Hinkmars von Reims über straffällige Kleriker*, ed. Gerhard Schmitz (Hannover: Hansche Buchhandlung, 2004). For a contemporary papal view—by Nicholas I—on episcopal judges, declaring that suspect and hostile bishops could not judge, see Heredia y Valle, "Die Ablehnung," 685.

110 A good example is his censure of Lothar, king of the East Frankish kingdom, concerning his marriage. Lothar viewed his marriage, which Hicmar considered uncanonical, as entirely a private matter. Hincmar disagreed. See Fowler-Magerl, *Ordo*, 18. On the interrelationship of secular and ecclesiastical legislation reflected by the capitularies, Hubert Mordek, "Karolingische Kapitularien," in *Überlieferung und Geltung normativer Texte des frühen und hohen Mittelalters*, ed. Humbert Mordek (Sigmaringen: Jan Thorbecke Verlag, 1986), 28–29.

111 John Gilchrist, "Canon Law," in *Medieval Latin. An Introduction and Bibliographical Guide*, ed. F.A.C. Mantello and A.G. Rigg (Washington: Catholic University of America Press, 1996), 241–44, also Harald Zimmermann, "Römische und kanonistische Rechtskenntnis und Rechtsschulung im frühen Mittelalter," in: *La scuola nell'occidente latino nell'alto medioevo* (Spoleto: Centro italiano di studi sull'alto medio aevo, 1972), 767–94.

112 In general, Rosamond McKitterick, *The Carolingians and the Written Word* (Cambridge: Cambridge University Press, 1989), also her essay "Glossaries and Other Innovations in Carolingian Book Production," in *Turning Over a New Leaf: Change and Development in the Medieval Manuscript*, ed. Erik Kwakkel, et al. (Leiden: Leiden University Press, 2012), 210–76.

113 See the Carolingian canon law website constructed and administered by Professor Firey, <http://ccl.rch.uky.edu/> accessed on 2 June 2014. See also Rosamond McKitterick, "Knowledge of Canon Law in the Frankish Kingdoms Before 789: The Manuscript Evidence," *Journal of Ecclesiastical History* 36 (1985): 97–117. For an example of a canonistic glossary, Bruce C. Brasington, "A Note on a Glossary to a Carolingian Canon Law Manuscript," *Pecia* 2 (2003): 7–12.

book 5 (treating law);¹¹⁴ glosses to manuscripts of Pseudo-Isidore also occasionally note process.¹¹⁵

In addition to texts, men also learned the law, as they always had, through consultation. Occasionally there is some evidence of this.¹¹⁶ For example, the *Miracles of Saint Benedict* record a dispute between the monasteries of Fleury and Saint-Denis where men skilled in the law, *legum doctores*, were consulted. Having decided on a judicial duel, one broke ranks and, arguing that a compromise was more appropriate, was able to persuade them to move the case to Orléans for a second opinion from more learned men.¹¹⁷

Rent by civil war and invasion, the Carolingian empire fractured during the ninth century.¹¹⁸ It proved ever more difficult to emulate and implement the classical, Roman governmental and legal models that had so inspired Charlemagne and his circle of advisors.¹¹⁹ At the same time, what the Carolingians had achieved was not forgotten, and their influence, for example through the capitulary, survived amidst the turmoil and also crossed the channel.¹²⁰ Older canonical collections were copied; new ones, some chronologically, others, thematically-arranged, were compiled.¹²¹ Bishops continued

114 Joseph Tardif, "Un manuel élémentaire de droit romain à l'époque carolingienne. Extraits et abrégés juridiques des *Étymologies* d'Isidore de Séville," *Mélanges Julien Havet. Recueil de travaux d'érudition dédiés à la mémoire de Julien Havet, 1853–1893* (Paris: Leroux, 1895), 659–81. See also Friedrich Maassen, "Die Glossen des canonischen Rechts aus dem karolingischen Zeitalter," *SB Wien, Ph.-Hist. Kl.* 84 (1876): 235–98.

115 Zechiel-Eckes, "Ein Blick," 51–53.

116 On lay knowledge of law, Wilfried Hartmann, "Rechtskenntnis und Rechtsverständnis bei den Laien des früheren Mittelalters," in *Aus Archiven und Bibliotheken. Festschrift für Raymund Kottje zum 65. Geburtstag*, 3 vols., ed. Hubert Mordek (Frankfurt am Main: Peter Lang, 1992), 3.1–19.

117 Rio, *Legal Practice*, 200–01, also Wormald, *The Making of English Law*, 70–92 treating as well the Orléans trial within a detailed discussion of Frankish/Carolingian courts and cases.

118 For a good introduction to the subject, Rosamond McKitterick, *The Frankish Kingdoms Under the Carolingians, 751–987*, (New York and London: Longman, 1996).

119 Wormald, *The Making of English Law*, chapter 2 and 479–480 for further reflection.

120 On the Carolingian legal legacy, engaging in particular the work of Patrick Wormald, David Pratt, "Written Law and the Communication of Authority in Tenth-Century England," in *England and the Continent in the Tenth Century. Studies in Honour of Wilhelm Levison* (1876–1947), ed. David Rollason, Conrad Leyser, Hannah Williams (Turnhout: Brepols, 2019), 332–33.

121 Rosamond McKitterick, *History and Memory in the Carolingian World* (Cambridge: Cambridge University Press, 2004), 249–59 with a list of Carolingian and 'post-Carolingian' collections.

to meet. Their councils treated points of procedure.¹²² In their canons, we find references both to older canon law and recent decretals from Pope Nicholas I.¹²³ Manuscripts also contain new copies of older civil law texts, for example excerpts from the *Theodosian Code*.¹²⁴

While bishops held their *audientia*, there were some changes underway. Already in the reign of Louis the Pious, Charlemagne's son, resident courts held by counts and bishops appeared in what would soon become the East Frankish kingdom.¹²⁵ Their decisions (*placita*) provide some information as to procedure, for example the use of witnesses and oaths, though these reports must be treated with caution.¹²⁶

Charlemagne had established the *missi dominici*, officials appointed to travel in order to make sure his decrees were followed and that his government and the church were in good order.¹²⁷ Among their number were bishops. While their jurisdiction over clerical disputes was assumed, in practice, royal power was often involved as well.¹²⁸ *Missi* were responsible for settling lay conflicts, a process that involved negotiating, and often clashing, with secular legal authorities.¹²⁹ These disputes drew in elites, their supporters, and even the local populace, all complicating the process of resolution.¹³⁰

During the ninth century, these episcopal burdens of mediation and judgment, already considerable, became even weightier. In the east, the *Sendgericht*

122 Greta Austin, "Bishops and Religious Law, 900–1050," in *The Bishop Reformed. Studies on Episcopal Power and Culture in the Central Middle Ages*, ed. John S. Ott and Anna Trumbore Jones (Aldershot: Ashgate, 2007), 44–45.

123 Wilfried Hartmann, *Das Konzil von Worms 868. Überlieferung und Bedeutung* (Göttingen: Vandenhoeck and Ruprecht, 1977), 77–81.

124 On manuscripts from the late Merovingian and Carolingian periods containing Roman law, Hartmann, *Kirche und Kirchenrecht um 900*, 85–90. That Alcuin also had cited the *Theodosian Code* and the *Lex romana visigothorum* along with canonistic authorities in his dispute with Theodulf of Orléans, Meens, "Dispute Settlement," 286.

125 Warren Brown, *Unjust Seizure. Conflict, Interest, and Authority in an Early Medieval Society* (Ithaca and London: Cornell University Press, 2001), 141–44, 163, also Hartmann, "Zum geistlichen Gericht," 112–13.

126 Brown, *Unjust Seizure*, 153–54.

127 Jennifer R. Davis, "A Pattern for Power: Charlemagne's Delegation of Judicial Responsibilities," in *The Long Morning of Medieval Europe. New Directions in Early Medieval Studies*, ed. Jennifer R. Davis and Michael McCormick, (Aldershot: Ashgate, 2008), 235–40. A good example is provided by Meens, "Dispute Settlement," 289–90 concerning a fugitive cleric who triggered conflict between Alcuin and Theodulf of Orléans.

128 Davis, "Charlemagne's Delegation," 241.

129 Davis, "Charlemagne's Delegation," 242.

130 Meens, "Dispute Resolution," 295.

appeared.¹³¹ An initiative of reformers, the *Sendgericht* functioned rather like a circuit judge and his staff. A bishop and his assistants travelled periodically throughout their diocese to check on clerical and lay discipline and to hear and judge disputes.¹³² In theory, if not always practice, the bishop was supposed to undertake this visitation regularly; often he was accompanied by an archdeacon or archpriest to handle less-pressing cases.¹³³ In their presence, men were sworn to reveal all crimes or breaches of ecclesiastical discipline that had occurred since the previous visitation.¹³⁴ The conciliar decrees and episcopal statutes prescribing, and extending, episcopal visitation were eventually gathered into collections like the *Libri duo* of Regino of Prüm and passed on to later compilations.¹³⁵

Another procedural legacy of the Carolingians that survived into the tenth century, before its transformation by political and social forces associated with

131 With a comprehensive examination, Hartmann, *Kirche und Kirchenrecht*, 245–61, also Rudolf Schieffer, “Zur Entstehung des Sendgerichts im 9. Jahrhundert,” in *Medieval Church Law and the Origins of the Western Legal Tradition. A Tribute to Kenneth Pennington*, ed. Wolfgang P. Müller and Mary E. Sommar (Washington: The Catholic University Press of America, 2006), 50–56.

132 Franz Kerff, “Das Würseler Sendgericht von der Karolingerzeit bis zum 16. Jahrhundert,” in *Würselen. Beiträge zur Stadtgeschichte*, 2 vols., ed. Margret Wensky and Franz Kerff (Cologne: Rheinland-Verlag, 1989), 63–65, also Austin, “Bishops and Religious Law,” 42–43.

133 Kerff, “Sendgericht,” 67.

134 Kerff, “Sendgericht,” 67. Penitential collections are also a valuable source for both clerical and lay discipline, though the degree to which they were part of canon law—as understood in the early Middle Ages—or confined to ‘pastoral care’ or served as reference works with no necessary connection to particular practice remains disputed. See A.H. Gastra, “Penance and the Law: The Penitential Canons of the *Collection in Nine Books*,” *Early Medieval Europe* 14.1 (2006): 85–102 and, in the same volume, Ludger Körntgen, “Canon Law and the Practice of Penance: Burchard of Worms’s Penitential,” 103–17. That the penitential collections interrogated individuals in much the same way as did a judge, and penalized procedural delicts such as false witness, Franz Kerff, “Das sogenannte *Paenitentiale Fulberti*. Überlieferung, Verfasserfrage, Edition,” *ZRG KA* 104 (1987): 1–40. Discussing bishops judging in Italy during the second half of the ninth century, Hartmann, “Zum geistlichen Gericht,” 122.

135 Kerff, “Sendgericht,” 65. Analyzing the contents of Regino and other collections and arguing that these responded to bishops’ legal needs, Austin, “Bishops and Religious Law,” 46–52. See also Wilfried Hartmann, “Zu Effektivität und Aktualität von Reginos Sendhandbuch,” in *Medieval Church Law*, 33–49 and Charles West, “Legal Culture in Tenth-Century Lotharingia,” in *England and the Continent*, 353–57. One important, later compilation, is the *Decretum* of Burchard of Worms. On Burchard, Greta Austin, *Shaping Church Law Around the Year 1000. The Decretum of Burchard of Worms* (Farnham: Ashgate, 2009).

the 'feudal revolution',¹³⁶ was the *advocatus*. As Charles West notes, these laymen representing clergy at court, whether royal or comital, were to be learned and skilled in the law.¹³⁷ Hincmar of Rheims, always zealous in defense of ecclesiastical rights, especially his own, had enthusiastically supported this office, which acted as a barrier to the penetration of secular law into the church.¹³⁸ Hincmar drew, and not always clearly or faithfully, from both civil and canon law to support his position.¹³⁹ The advocate, however, did more than defend the immunity of the ecclesiastical foundation he served; he was also active, as West demonstrates, in court to represent and advance his patron's interests, above all in property disputes, and to aid in the resolution of conflicts.¹⁴⁰

As we move towards the year 1000, the sources continue to shed some light, if faint, on ecclesiastical procedure.¹⁴¹ At least on the surface, little had changed since the fourth century. The bishop was supposed to hear and judge as an 'interested mediator' whose arbitration ideally led to compromise and consensus.¹⁴² The *Sendgericht* required him to travel as well. All these requirements, occasionally fortified by Roman law,¹⁴³ lay scattered in numerous canonical compilations, but none of these was normative.¹⁴⁴ Lay patronage of the church, both monastic and secular, still shaped ecclesiastical judgments.¹⁴⁵

136 See chapter 1.

137 West, "The Carolingian Advocate," 187, 195–96, the latter demonstrating evidence of legal knowledge. In theory, if not always practice, advocates were also responsible for 'handing over' the guilty to the count and making sure that those who had fled ecclesiastical to royal land were returned.

138 West, "The Carolingian Advocate," 189, noting that Hincmar, unlike the writers of the *ordines* we shall later encounter, was not in principal opposed to any clerical summons before a secular judge; however, he insisted on the cleric's representation there by an advocate.

139 West, "The Carolingian Advocate," 190–91.

140 West, "The Carolingian Advocate," 200–03.

141 Brown, *Unjust Seizure*, 186–87 noting that, in the case of Bavaria, sources are far more sparse and problematic after the middle of the ninth century.

142 Austin, "Bishops and Religious Law," 43, also Brown, *Unjust Seizure*, 176–79.

143 Siems, "Begrifflichkeit in Reginos Sendhandbuch," 77–78, noting both Regino's reference to *romana auctoritas* in the requirement that a valid document of manumission must contain both consul and date and his disapproval of Roman law concerning the marital status of slaves separated by sale.

144 For example, whether a bishop in judgment followed Regino of Prüm's distinction between willing and unwilling behavior (*sponte, non sponte*), on which see Siems, "Begrifflichkeit in Reginos Sendbuch," 68–69, 87.

145 That the Carolingian advocate was not at all like the later *Vogt*, West, "The Carolingian Advocate," 186–87, 204–05.

When a saint's life, a *vita*, praised a tenth-century bishop for his fidelity to justice and equity, we rarely have any record of how he had actually judged in his *audientia episcopalis*.¹⁴⁶ Equally, we cannot know whether any bishop who read Regino of Prüm ever followed his advice to judge on the circumstances of the case, and not 'from his own heart.'¹⁴⁷ Legal procedure continued to be conceived in theological, indeed sacramental and liturgical, ways.¹⁴⁸ Amidst his treatment of penance, Burchard of Worms outlines procedures for the sinner's excommunication and subsequent restoration. However, these bear little if any resemblance to the legal process we shall encounter in upcoming chapters.¹⁴⁹ When documents do contain technical terms like *iudicium* and *iudex*, judgment/trial and judge, these do not guarantee that a formal trial before a judge ever took place.¹⁵⁰

The language of legal procedure remained theological, a sacramental, penitential conception of law. Separation of theology and law would, in fact,

-
- 146 See, for example, the discussion of the tenth-century bishop of Augsburg, Ulrich, by Rolf Schmidt, "*Legitimum ius totius familiae*. Recht und Verwaltung bei Bischof Ulrich von Augsburg," *Aus Archiven und Bibliotheken*, 3, 215, also 219 on the lack of clear information on how he carried out his *Sendgericht*. Ulrich's *vita* is, however, an exception, on which see Hartmann, "Probleme des geistlichen Gerichts," 649–50, though also see his analysis of the later *vita* of Benno II of Osnabrück in "Zum geistlichen Gericht," 121–22. See also his comments in *Kirche und Kirchenrecht*, 311–12.
- 147 Siems, "Begrifflichkeit in Reginos Sendhandbuch," 81. Regino's advice, taken from a penitential collection, anticipates similar counsel in the later *ordines*. On the reception of Regino in the tenth century, in addition to his translation mentioned in the preface to this study, Wilfried Hartmann, "Probleme des geistliche Gerichts im 10. und 11. Jahrhundert: Bischöfe und Synoden als Richter im ostfränkischen-deutschen Reich," in *La giustizia nell'alto medioevo, secoli ix–xi* (Spoleto: Presso la sede del Centro, 1997), 633–36, also treating instructions for clerics assigned to the *Sendgericht*. These are preserved in several manuscripts.
- 148 On the role of penance in law and punishment, its public character and function in maintaining order and resolving disputes, in the Carolingian period, which could, I believe, also be extended to Burchard's world, Meens, "Dispute Resolution," 298–99.
- 149 Austin, *Shaping Church Law*, 184–85. Granted, neither theology nor liturgy, if subsumed into the rituals of litigation, will be entirely absent in the *ordines* to come. The vow will be a good illustration of this.
- 150 Stephen D. White, "Pactum . . . legem vincit et amor iudicium," "The Settlement of Disputes by Compromise in Eleventh-Century Western France," *American Journal of Legal History* 22 (1978): 293–94, rp. in his *Feuding and Peace-Making in Eleventh-Century France* (Aldershot: Ashgate, 2005), as chapter 5 with same pagination; also Brown, *Unjust Seizure*, 196–97 on the trend in the East Frankish kingdom by the middle of the ninth century towards extrajudicial settlements.

only begin in the twelfth century, and the *ordines* will witness this development. For example, Hincmar of Rheims did consider the need for proof,¹⁵¹ and that the judge should reflect on circumstances, for example necessity, before sentencing.¹⁵² However, his language was not at all juridical, at least as understood by the authors we shall encounter in later chapters. To Hincmar, what was at stake was the soul.¹⁵³ Our *ordines'* concern with the body, and the affairs and judgments of this world, will provide a marked contrast to this view of the law and procedure.

Obviously, the lack of sources is a major reason for our imperfect understanding of the ecclesiastical court in this period. As we shall see in the next chapter many, perhaps most, disputes never even made it to court. Instead, they were settled by arbitration and compromise, facilitated by secular and ecclesiastical mediators.¹⁵⁴ These negotiations were either never written down or have not survived. When disputes went further and left some record, the report is almost always laconic: a dispute took place and was settled, probably by oaths and ordeal. When written law was used in court, it may have been read aloud; this 'declaration' of authority likely would leave no trace in any account of the proceedings.¹⁵⁵

Very occasionally, we do encounter some evidence.¹⁵⁶ Sometimes a notorious dispute or contested judgment attracted attention which made its way into a text. An example comes from two eleventh-century German chroniclers who, commenting on an ordeal, a judicial combat, that had taken place shortly

151 Mathias Schmoeckel, "Nicholaus I und das Beweisrecht im 9. Jahrhundert," in *Grundlagen des Rechts. Festschrift für Peter Landau zum 65. Geburtstag*, ed. Richard Helmholz, et al. (Paderborn and Munich: Schöningh, 2000), 75–76.

152 Harald Siems, "In ordine posuimus. Begrifflichkeit und Rechtsanwendung in Reginos Sendhandbuch," in *Recht und Gericht in Kirche und Welt um 900*, ed. Wilfried Hartmann and Annette Grabowsky (Munich: R. Oldenbourg Verlag, 2007), 75–76.

153 Schmoeckel, "Procedure, Proof, and Evidence, 148–51, also Koziol, *Begging Pardon and Favor*, 85–86 on Hincmar's description of the Last Judgment 'as a process of intercession and supplication.'

154 A good discussion of the considerable literature on dispute resolution in the Carolingian and post-Carolingian period is provided by Meens, "Dispute Settlement," 278–300, noting also that its diversity defies a dichotomy between extrajudicial compromise and formal judgment, and that public power did not completely fade away even in the most troubled times.

155 Pratt, "Written Law," 333.

156 For example, appeals to local memory to provide evidence. An example is a dispute in the 1050s between Ramsey and Thorney Abbey concerning a fen. See R.C. van Caenegem, *The Birth of the English Common Law*, 2nd ed. (Cambridge: Cambridge University Press, 1988), 77. On memory, see also chapter 3 below in the discussion of prescription.

before the turn of the millennium, noted that the 'people' believed the victim, Count Gero of Alsleben, had been innocent. Their unease with an apparently failed manifestation of divine justice was confirmed, as is often the case in hagiography, by the intact state of the deceased's body and clothes. Yet, even in this remarkable text, we have no detail about the process that had led up to the ordeal nor why the 'people' had come to question its outcome.¹⁵⁷

A final text illustrates the challenges of understanding procedure in this period. An act from the late eleventh century recounts a dispute, turned violent, between two French monasteries:¹⁵⁸

We have written to those who still live how the abbot of the monastery of St. Martial at Limoges, Aldemarus, settled a dispute between the monks of Uzerches and Vigeoise who were contesting over the inhabitants, though not living, but dead, on the land called Borda. Strife between the monks of these two houses grew so severe that (there was an attack) and a monk carrying a body on a bier for burial was struck on the head by a sword and died. When he heard this, the venerable pastor (abbot) Aldemarus was greatly disturbed. Aldemarus was now in charge of the affairs of the monastery of Vigeoise and, suffering along with its monks as a father and lord, summoned the man of good memory, Geraldus, abbot of Uzerches. With him and his monks, he settled such malicious madness in the following way. This father (Aldemarus) said most sweetly 'Know for certain that we are completely unable to avoid peril to (our) souls unless the deceased of that land (Borda) are divided in turn between the churches (the monasteries). Thus, let no opposition arise to this equitable division, but whoever should die first, rich or poor, great or small, shall be equal to the one who dies next.' Thus a pact of peace was made between the two churches, which stated that they should take turns receiving the body and income of whomever, rich or poor, came to them, and eternal peace should then last between them. From the many present there at that concord, which was made in the reign of King Phillip and the episcopate of Wido at the see of Limoges, we especially note three: Gauzfredus, archdeacon of Limoges, mediator of the dispute, Stephen, provost of

157 Karl Leyser, *Rule and Conflict in an Early Medieval Society* (Oxford: Basil Blackwell, 1989), 99, referring to the chronicles of Thietmar of Merseburg and Wulfhere. See also Koziol, *Begging Pardon and Favor*, 310–11 on the spectators' role in determining 'the ritual's meaning.' Along with the ordeals, he mentions other public acts such as crown-wearings.

158 *Cartulaire de l'abbaye de Vigeois en Limousin (954–1067)*, ed. H. De Montégut (Limoges: Ducourtioux and Gout, 1907) 49–50.

Uzerches, (another) Gauzefredus, provost of Vigeoise. Attesting that truth is found in the mouths of two or three witnesses,¹⁵⁹ may the witnesses to this peace firmly stand.

One moment in a protracted (and unsettled, despite this document) dispute over *sepultura*, burial rights, between two monasteries,¹⁶⁰ this act from Limoges gives us a good sense of what was at stake: the income, either from gifts at the burial or subsequent donations by the family, to the monastery fortunate enough to bury the deceased. Along with income came prestige, and connections with the relatives and associates of the deceased. These benefits were worth fighting for. Given the prevalence of feud in the eleventh century, which often involved monasteries and churches, both as victims and actors within the web of violence,¹⁶¹ Abbot Aldemarus had every reason to be concerned. We glimpse the *actors* involved in the mediation, and their sensible decision, a concord, that was supposed to end the strife. Unfortunately, what again we lack is how the *actions* unfolded. We are presented with the beginning and end of a story. What took place in the middle, the process, is nowhere to be found. Certainly, there was procedure. There were rules; but these were local, customary, oral, not connected with the written law. Soon, however, we would have not only more records but also new rules. We turn now to the procedural changes in secular and sacred law, changes driven by the renewed study of the Roman *Digest* and ecclesiastical reform.

159 Deut. 17.6.

160 The dispute dragged on into the twelfth century, Bruce C. Brasington, "Disputing the Dead. Litigation Over *Sepultura* in the Diocese of Limoges in the Early Twelfth Century," in *Law and Disputing in the Middle Ages. Proceedings of the Ninth Carlsberg Academy Conference on Medieval Legal History*, ed. Per Andersen, et al. (Copenhagen: DJØF Publishing, 2013), 41–54.

161 For a striking example recorded in a letter of Bishop Ivo of Chartres, Bruce C. Brasington, "Crusader, Castration, Canon Law: Ivo of Chartres' Letter 135," *The Catholic Historical Review* 85.3 (1999) 367–82.

The Ecclesiastical *Ordo iudiciorum* Around 1100

Despite its profound orality and adherence to ritual and custom, secular and ecclesiastical law had never abandoned the text during the early Middle Ages. A bishop had access to written laws provided he had an adequate library.¹ Canonical collections were undoubtedly consulted during councils.² The canon law of procedure, whether derived from the letters of late-antique popes or decisions by councils, augmented by civil law from the *Codex*, *Novellae*, and derivative works lay scattered in treatises and canonical collections in monastic and cathedral libraries throughout the west, with the greatest number and concentration in the south.³ Yet, even when they were available, did any of these texts play a role in court?⁴

As noted in the Introduction, arbitration and compromise seem to have remained the norm.⁵ We are left with only terse procedural records, when we

-
- 1 There is also occasional evidence of reflection on these texts. Prefaces to early medieval canonical collections often discussed their sources and, by the tenth century, defended the inclusion of more recent texts, on which see Somerville and Brasington, *Prefaces to Canon Law Books*, chapters 1–2. On an early medieval canon addressing the question of proof when written sources are lacking, Bruce C. Brasington, “*Congrega Seniores Provinciae*: A Note on a Hiberno-Latin Canon Concerning the Sources of Authority in Ecclesiastical Law,” in *Plenitude of Power. The Doctrines and Exercise of Authority in the Middle Ages: Essays in Memory of Robert Louis Benson*, ed. R.C. Figueira (Farnham: Ashgate 2006), 1–10.
 - 2 West, “Legal Culture,” 357 noting the use of the Carolingian *Dionysio-Hadriana* and Regino of Prüm. That Burchard of Worms’ *Decretum* also may have been cited in the early eleventh century at a council held at Seligenstadt, though the evidence is not conclusive, *Concilia aevi saxonici et salici mxxiii–mlx*, ed. Detlev Jasper (Hannover: Hahnsche Buchhandlung, 2012), 12. Jaspers is not entirely convinced. More positive is Karl Ubl, *Inzestverbot und Gesetzgebung. Die Konstruktion eines Verbrechens* (Berlin: DeGruyter, 2008), 424, 426. I thank Dr. Greta Austin for these references.
 - 3 Olga Tellegen-Couperus, *A Short History of Roman Law* (New York: Routledge, 1993), 147. On the use of a sixth-century manuscript of the *Theodosian Code* in tenth-century Trier, West, “Legal Culture,” 359. See also the legal map described by Wormald, *The Making of English Law*, 480.
 - 4 For discussion of a tenth-century “pamphlet” preserved in a Leiden manuscript which may indicate ‘penetration of the (legal) text into local society,’ West, “Legal Culture,” 358.
 - 5 That these, however, should not be placed in opposition with formal, legal judgment, and should be seen often as complementary stages in a complex process, Richard Keyser, “‘Agreement Supersedes Law, and Love Judgment.’ Legal Flexibility and Amicable Settlement

have them at all.⁶ Bishops' letters, on which see more below, do sometimes shed light on both secular and ecclesiastical disputes. However, these generally tell us only that laymen and clergy disputed and that there was a resolution. Information on the process is largely absent.⁷ Other sources from the late tenth and early eleventh centuries do reveal that some ecclesiastics were becoming uncomfortable with the ordeal,⁸ though there is little, if any, reflection to

in Anglo-Norman England," *Law and History Review* 30.1 (2012): 37–88, treating the later eleventh century.

- 6 For the later Carolingian period and into the early eleventh century, among many studies, Brown, *Unjust Seizure*, 201–203, also his essay, "Conflict, Letters, and Personal Relationships in the Carolingian Formula Collections," *Law and History Review* 25 (2007): 323–44. Critiquing older scholarship arguing that judgments were rendered, indeed bound, by strict adherence to rigid forms inherited from the distant past and arguing that both litigants and judges had more flexibility to make 'procedural choices' in court, Stephen D. White, "Tenth-Century Courts at Mâcon and the Perils of Structuralist History: Re-reading Burgundian Judicial Institutions," in *Conflict in Medieval Europe. Changing Perspectives on Society and Culture*, ed. Warren C. Brown and Piotr Górecki (Aldershot: Ashgate, 2003), 57 and, in the same volume, an overview of the main themes and literature by Warren C. Brown and Piotr Górecki. "What Conflict Means: The Making of Medieval Conflict Studies in the United States, 1970–2000," 1–33. For caution about the functionalist reading of dispute resolution, noting the variety of factors at work in any particular case, John Hudson, "Court Cases and Legal Arguments in England, c. 1066–1166," *Transactions of the Royal Historical Society. Sixth Series* x (Cambridge: Cambridge University Press, 2000): 114–15. On the *boni homines* at this time, men who came from the class that produced the castellans, who served, for example, as witnesses, Monique Bourin, "Les boni homines de l'an mil," in *La justice de l'an mil* (Paris: La Documentation française, 2003), 53–63. On England, Richard H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford: Oxford University Press, 2004), 62–65.
- 7 Wilfried Hartmann, "Die Briefe Fulberts als Quelle für die Praxis des bischöflichen Gerichts in Frankreich am Beginn des 11. Jahrhunderts," in *Grundlagen des Rechts*, 93–103 and Bruce C. Brasington, "Collections of Bishops' Letters as Legal Florilegia," in *Law Before Gratian*, 73–76.
- 8 Surveying canonistic sources on the church and the ordeal in the early Middle Ages, Jean Gaudemet, "A propos de la preuve dans le droit canonique médiéval," in *Miscellanea Dominico Maffei Dicata. Historia-Ius-Studium*, 3 vols., ed. Antonio García y García and Peter Weimar (Goldbach: Keip Verlag, 1995), 2.1–10. See also James, "Beati Pacifici," 32–33. That the ordeal was susceptible to negotiation, Stephen D. White, "Proposing the Ordeal and Avoiding It: Strategy and Power in Western French Litigation, 1050–1150," in *Cultures of Power: Lordship, Status and Process in Twelfth-Century Europe*, ed. Thomas N. Bisson (Philadelphia: University of Philadelphia Press, 1995), 89–123, reprinted as chapter vii in his *Feuding and Peace-Making in Eleventh-Century France*, with same pagination. White treats the strategy behind proposing, or withdrawing, from the ordeal and also the need to avoid treating it as some sort of fixed process that did not vary according to time, region, or the circumstances of the dispute. Yet, the ordeal remained from the end of the ninth to the mid-eleventh century the typical form of proof, on which see Hartmann, "Probleme des geistlichen Gerichts," 663. For the

give us deeper insight into their reservations. Charters, increasingly abundant, occasionally employ Roman legal terms, for example concerning the summoning of witnesses.⁹ However, we cannot be certain whether these were understood in any technical sense.¹⁰ In sum, as we move into the eleventh century, we still have a very incomplete sense of how procedure was understood and practiced.¹¹

Though the invasions by Vikings, among others, had ceased, violence had not. Granted, the longstanding debate over the 'feudal revolution' initiated decades ago by Marc Bloch,¹² a 'revolution' traditionally viewed as led by castellans and knights who contested counts and bishops (who were suffering from the "collapse of Carolingian authority") and enthusiastically oppressed the serfs is still not settled.¹³ In this chaotic "critical restructuring of

purgatio canonica, the oath taken by clergy that was increasingly becoming a way for them to avoid any physical ordeal, among many studies, Antonia Fiori, "Inchiesta e purgazione canonica in epoca gregoriana," in *L'enquête au moyen âge*, ed. Claude Gauvard (Rome: École française de Rome, 1998), 29–39.

- 9 Helmholtz, *The Canon Law*, 63. On Ivo of Chartres' later concerns about the ordeal, see below.
- 10 Bishop of Worms in the early eleventh century, Burchard was not only a capable bishop and staunch supporter of Emperor Henry II, but also the compiler of a very influential collection of canon law, his *Decretum*. On Burchard, Austin, "Burchard of Worms," 937; see also her essay "Bishops and Religious Law," 55–56 on Burchard's *Lex familiae Wormatiensis ecclesiae*, a work of legal guidelines for Burchard's diocese but of value elsewhere as well, which provides an exception to the period's general silence on procedure. Austin notes how Burchard was concerned to establish the law governing his *familia* and, in doing so, gives us some insight into secular jurisdiction. For example, a *magister loci* judged any property damage a member of the *familia* might have committed; also, Burchard tells us that an *advocatus* represented the *familia* before the secular judge.
- 11 To give but one example, contemporary sources praise Bishop Burchard of Worms' learning and diligence as a judge. His *Lex familiae Wormatiensis ecclesiae* and *Decretum* give evidence of the former; evidence for the latter, how he judged, is lacking. See Austin, "Burchard of Worms," 931, also Hartmann, "Probleme des geistlichen Gerichts," 644. On the debate, though not treating bishops, concerning 'formal judicial institutions' and negotiations based on personal relations, with reference to scholarship by Michael Clanchy and others, Keyser, "Agreement Supercedes," 41–43.
- 12 Marc Bloch, *Feudal Society*, trans. L.A. Manyon (London: Routledge and Kegan Paul, 1961), 359–68, cited and discussed in the context of more recent treatments of "judicialized lordship" in the eleventh century by West, "Legal Culture," 372–73.
- 13 On the ongoing debate, and responding to essays by Chris Wickham, Timothy Reuter, Dominique Barthélemy, and Stephen White, T.N. Bisson, "The 'Feudal Revolution': Reply," *Past and Present* 155 (1997): 208–25. On the "collapse" or not of Carolingian mechanisms of public order, arguing that the violence, which is undeniable, was due to new "economic,

power,”¹⁴ ecclesiastical property, tied to a myriad of rights, required defending.¹⁵ By the early eleventh century, across much of western Europe, the church, whether secular or monastic, had entered “times of trouble.”¹⁶ The ‘Peace of

religious, and political stimuli,” Paul Fouracre, “Marmoutier and its Serfs in the Eleventh Century,” *Transactions of the Royal Historical Society* 6th Ser. 15 (2005): 29–49. Fouracre also provides an excellent review and analysis of scholarship on the debate concerning the ‘feudal revolution,’ taking into account, above all, the works of Georges Duby. He cautions us that what we see as sudden, violent transformation in society and structures of lordship may be due to more abundant evidence that thus enables to get a better idea of how society actually functioned. That the ‘wholesale decay of local ‘public’ justice’ traditionally assumed may be exaggerated, Pratt, “Written Law,” 338.

- 14 Bisson, “Feudal Revolution,” 224, also 215, noting that this violence, however, prevalent, was not “inherent” to how lordship was expressed.
- 15 For an insightful study of the power of a German bishop in this period, power based on a complex array of property, patronage, and ‘social networks,’ Timothy Reuter, ‘Property Transactions and Social Relations between Rulers, Bishops, and Nobles in Early Eleventh-Century Saxony: The evidence of the Vita Meinwerki. Appendix 2: Surviving Notices of Property Transactions from Meinwerk’s Pontificate,’ in *Property and Power in the Early Middle Ages*, ed. Wendy Davies and Paul Fouracre (Cambridge: Cambridge University Press, 1995), 165–99, especially 193–94. Many of the essays in this volume consider the interrelationship between ecclesiastical immunities and lay lordship and patronage. On property, discussing the earlier Middle Ages as to extent of ecclesiastical lands, Ian Wood, “Entrusting Western Europe to the Church, 400–750,” *Transactions of the Royal Historical Society. Sixth Series* XXIII (Cambridge: Cambridge University Press, 2013): 37–73; for the central Middle Ages, David Herlihy, “Church Property on the European Continent, 701–1200,” *Speculum* 36 (1961): 81–105. As always, evidence is incomplete and problematic. For late Anglo-Saxon England, Catherine Cubitt, “Bishops and Councils in Late Saxon England: The Intersection of Secular and Ecclesiastical Law,” in *Recht und Gericht*, 152. See also John Howe, “The Nobility’s Reform of the Medieval Church,” *The American Historical Review* 93.2 (1988): 317–39, focussing on Italian ecclesiastical property in the eleventh century. Noting that canonical collections of the reform era often included canons declaring that bishops should not be judged when ‘despoiled of their goods or ejected from their sees,’ John Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford: Clarendon Press, 1994), 32 and n. 78, citing, for example, the *Collectio Lanfranci*, compiled by Lanfranc, archbishop of Canterbury.
- 16 Bisson, “Feudal Revolution,” 218. See also Koziol, *Begging Pardon and Favor*, 278–79, also Davies and Fouracre, “Introduction,” in *Property and Power*, 7 cautioning against the view that, while there was ‘public weakness’ in the eleventh century, there was always considerable local and regional diversity in both lordship and government. They also emphasize, as do many of the essays in their volume, the need to move beyond a “Francocentric” understanding of the ‘feudal revolution.’ Compare also, in the same volume, Chris Wickham, “Property Ownership and Signorial Power in Twelfth-Century Tuscany,” 241–42, challenging the ‘excessively romantic,’ violent view of the ‘feudal revolution,’ noting that in

God' movement is but one well-known example of how bishops and abbots, if with only limited success, responded.¹⁷

These times could not help but shape ecclesiastical litigation. In eastern France and into the Empire, secular lords, as they had done for centuries,¹⁸ were utilizing monastic houses to build and extend their power. However, they seem to have been even more aggressive than their predecessors in, what Charles West has called, 'the exercise of judicial authority over the monastery's own lands.'¹⁹ In the kingdom of France, advocates contended with one another (as well as with counts and kings) to maintain and, if possible, advance, claims over ecclesiastical foundations.²⁰

Rising population, increased urbanization, and the 'commercial revolution' 'contributed as well to legal and institutional change.²¹ From Italy to northern Europe, the developing *ars dictaminis*, rhetoric specially applied to the writing of letters and formulation of documents, reflected this growing need for literate men. We see as well an expanded role for notaries.²²

Italy signorial power was only implemented with effort and partially, and often achieved through consent.

- 17 On this diverse religious, social, and political movement, the essays in *The Peace of God: Social Violence and Religious Response in France around the Year 1000*, ed. Richard Landes and Thomas Head (Ithaca: Cornell University Press, 1992).
- 18 Often they were still titled *advocatus*, but how they exercised their power differed from how it had been expressed in the Carolingian period. On this transition, Davies and Fouracre, "Introduction," in *Property and Power*, 257, noting that twelfth-century advocates, formerly appointed by ecclesiastical foundations on an 'ad hoc basis' to, above all, protect their immunity, came to hold 'permanent appointments for administration of the immunity, deriving considerable personal benefit and power from the office ...'
- 19 Charles West, "Advocating Change: Monasteries, Territories and Justice between East and West Francia, 11th–12th Centuries," accessed at <http://ubn-resolving.de/urn:nbn:de:bsz:21-opus-67219> on 8 July 2015. West also draws upon a suggestion by Timothy Reuter that the *advocatus* in the east exercised power similar to the *bannum* of lords in the west. See also Wickham, "Property Ownership," emphasizing that seigneurial rights over land meant control over its inhabitants as well. This connection was not lost on ecclesiastical reformers demanding 'freedom' during the second half of the eleventh century.
- 20 Koziol, *Begging Pardon and Favor*, 142–43, also appendices 1 and 2 for tables on ecclesiastical-lay disputes and the 'procedural patterns' in northern France in the eleventh century. Considering the *Vogt* in Germany, see West, "Advocating Change," and Martin Clauss, *Die Untervogtei. Studien zur Stellvertretung in der Kirchenvogtei im Rahmen der deutschen Verfassungsgeschichte des 11. und 12. Jahrhunderts*, (Siegburg: Verlag Franz Schmitt, 2002), especially chapter 6 on ecclesiastical prohibitions.
- 21 Again, among many studies, Ronald G. Witt, *The Two Latin Cultures and the Foundation of Renaissance Humanism in Medieval Italy* (Cambridge: Cambridge University Press, 2012), parts 1, 3; 230–32.
- 22 As a guide to the extensive scholarship on both, Witt, *Two Latin Cultures*.

New intellectual forces were also at work. As noted in the Introduction, the *trivium*, especially rhetoric and dialectic, had been allied since antiquity with the law.²³ Dialectic, however, took on new importance during the second half of the eleventh century, due to theological and political challenges. The result was the scholastic method.²⁴

The scholastic method confronted the problem of sacred authorities that apparently conflicted, notwithstanding the principle of 'non-contradiction.' By the eleventh century, tradition contained a vast number of texts on any number of subjects, texts that were often anachronistic, possibly inapplicable, and, above all, contradictory. After the middle of the century, and throughout the next scholars, most famously Peter Abelard, would begin to employ dialectical analysis, the comparison and contrast of apparently contradictory texts, in the hopes of finding harmony, some sort of solution or synthesis that would allow one text to be chosen as more applicable to the problem at hand, but without discarding the other.

-
- 23 See Wifried Hartmann, "Rhetorik und Dialektik in der Streitschriftenliteratur des 11./12. Jahrhunderts," in *Dialektik und Rhetorik im früheren und hohen Mittelalter. Rezeption, Überlieferung und gesellschaftliche Wirkung antiker Gelehrsamkeit vornehmlich im 9. und 12. Jahrhundert*, ed. Johannes Fried (Munich: R. Oldenbourg Verlag, 1997), 73–95 and, in the same volume, John van Engen, "Letters, Schools, and Written Culture in the Eleventh and Twelfth Centuries," 97–132.
- 24 For example the debate between Berengar of Tours and Lanfranc over the Real Presence in the Eucharist. See Jaroslav Pelikan, *The Growth of Medieval Theology (600–1300)* (Chicago and London: The University of Chicago Press, 1978), chapters 4 and 5. Among many other studies, Charles Radding and Francis Newton, *Theology, Rhetoric, and Politics in the Eucharistic Controversy, 1078–1079* (New York: Columbia University Press, 2003). There was also the challenge of the 'nominalist' thought of Roscelin of Compiègne. The most famous figure in early scholasticism is undoubtedly Peter Abelard. Among many studies on Abelard and the scholastic method, particularly valuable essays are collected in two volumes by Constant Mews, *Abelard and his Legacy* (Aldershot: Ashgate, 2001) and *Reason and Belief in the Age of Roscelin and Abelard* (Aldershot: Ashgate, 2002). While, surprisingly perhaps, none of the *ordines* translated and commented upon in coming chapters are arranged in the scholastic, dialectical fashion, the hallmark of the scholastic method., their authors and readers were educated in it. Thus, it is always in the background of our texts. For two guides to the vast literature on the scholastic method, see the *Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism*, ed. Norman Kretzmann et al. (Cambridge: Cambridge University Press, 1982), also the extensive bibliography in Charles M. Radding and William W. Clark, *Medieval Architecture, Medieval Learning: Builders and Masters in the Age of Romanesque and Gothic* (New Haven and London: Yale University Press, 1992), 151–64.

Ecclesiastical reform also prompted renewed interest in canonical texts. Born in the monasteries and spreading into the wider church,²⁵ its call for elections free from lay ‘interference,’ clerical celibacy, and, above all, rejection of simony encouraged bishops and, eventually, the pope, to take an increased interest in the canon law.²⁶

Reform would also play a role in the development of legal procedure. When the papacy, beginning with Pope Leo IX, assumed an increasing role in leading reform, popes and their supporters turned to the canons (authentic or not), and found, particularly, though not exclusively, in Pseudo-Isidore a valuable body of authorities to support Rome’s primacy and jurisdiction. Integral to these was procedure, particularly Rome’s unique prerogatives as the ultimate appellate court. What the Carolingian forgers had created to protect the immunities of contemporary bishops now became, increasingly, a source for papal power.²⁷ The *ordo iudiciorum* was directed towards Rome.

By the time of the Investiture Contest between Pope Gregory VII and King Henry IV of Germany in the 1070s, we find periodic references to the *ordo iudiciarius*. One example comes from Bernold of Constance, a staunch

25 On its complex nature, Maureen Miller, “Religion Makes a Difference: Clerical and Lay Cultures in the Courts of Northern Italy, 1000–1300,” *The American Historical Review* 105.4 (2000): 1098–99.

26 For an introduction, Uta-Renate Blumenthal, *The Investiture Controversy. Church and Monarchy from the Ninth to the Twelfth Century* (Philadelphia: University of Pennsylvania Press, 1988), chapter 3, also two essays “Rom in der Kanonistik,” in *Rom im hohen Mittelalter: Studien zu den Romvorstellungen und zur Rompolitik vom 10. Bis zum 12. Jahrhundert*, Reinhard Elze zur Vollendung seines siebzigsten Lebensjahres gewidmet, ed. Benhard Schimmelpfennig and Ludwig Schmugge (Sigmaringen: Jan Thorbecke Verlag, 1992), 29–39 and “History and Tradition in Eleventh-Century Rome,” *The Catholic Historical Review* 79 (1993): 185–96 and Orazio Condorelli, “San Pier Damiani e il diritto della chiesa nella *societas christiana*,” in *Mélanges Anne Lefebvre-Teillard*, 233–65, also, noting the difference in content between Burchard of Worms’ *Decretum* and compilations from the second half of the twelfth century emphasizing the authority and power of Rome and the pope, Hartmann, “Autoritäten,” 427. Arguing for an even earlier episcopal interest in canon law and challenging the Rome-oriented ‘top down’ view of canon law, Austin, “Bishops and Religious Law,” 41.

27 On the enormous scholarly literature and an excellent study in its own right, Kathleen G. Cushing, *Reform and Papacy in the Eleventh Century. Spirituality and Social Change* (Manchester and New York: Manchester University Press, 2005), especially chapter 4.

supporter of the pope.²⁸ Drawing upon Hincmar of Rheims,²⁹ Bernold wrote to Bernhard of Hildesheim to defend bishops summoned, but not appearing, at a council at Worms.³⁰ He defended them against a charge of contumacy, something that will also concern the *ordines* composed in the next century. Bernold also mentioned other points of procedure, for example the difference between manifest and hidden crimes.³¹

Thus, canon law was changing by 1100.³² The papacy issued privileges, which also often provoked later disputes. It also commissioned legates, whose delegated jurisdiction will be so important to ecclesiastical procedure during the course of the twelfth century.³³ Nor was procedure merely a Roman concern, as we find it emphasized in the regional councils of the Peace of God movement and synodal courts.³⁴ These remind us that Rome was not the only engine driving renewed interest in legal procedure. More on this shortly.

-
- 28 A staunch supporter of Pope Gregory VII, this German monk and priest wrote various apologetic and polemical works to defend the 'papal reform' against Henry IV and his supporters and to criticize abuses such as married priests. He extensively mined earlier canonistic works for his treatises. Bernold is thus a major figure in the intensive study of canon law, particularly in regards to the claims of Rome, during the reign of Gregory VII. A relatively recent study of Bernold and a critical edition of one of his polemics, is Bernold von Konstanz, *De excommunicatis vitandis, de reconciliatione lapsorum et de fontibus iuris ecclesiastici* (*Libellus x*), ed. Doris Stöckly, with assistance from Detlev Jasper (Hannover: Hahnsche Buchhandlung, 2000).
- 29 On this text, see the Introduction.
- 30 Discussing the correspondence between Bernard and Bernold and its political context, Johannes Fried, "Die römische Kurie und die Anfänge der Prozeßliteratur," *ZRG KA* 59 (1973): 155–59.
- 31 Fowler-Magerl, *Ordo*, 20–22. On Bernold of Constance's consideration of whether priests could accuse higher clergy, Peter Landau, "Die Anklagemöglichkeit Untergeordneter vom Dictatus Papae zum Dekret Gratians. Ein Beitrag zur Wirkungsgeschichte gregorianischen Rechtsdenken," in *Ministerium Iustitiae. Festschrift für Heribert Heinemann zur Vollendung des 60. Lebensjahres*, ed. André Gabriels and Heinrich J.F. Reinhardt (Essen: Ludgerus Verlag, 1986), 375.
- 32 Stephan Kuttner, "The Revival of Jurisprudence," in *Renaissance and Renewal in the Twelfth Century*, ed. Robert L. Benson and Giles Constable, with Carol D. Lanham (Cambridge, Mass: Harvard University Press, 1982), 299–323, also Hartmann, "Zum geistlichen Gericht," 124.
- 33 Dietrich Lohrmann, "Papstprivileg und päpstliche Delegationsgerichtsbarkeit im nördlichen Frankreich zur Zeit der Kirchenreform," in *Proceedings Berkeley*, 535–50.
- 34 Lotte Kéry, "Canon Law and Criminal Law: The Results of a New Study," in *Proceedings Washington*, 412–13.

Legal theory was also emerging. From new canonical compilations with more sophisticated, thematic organization to treatises shaped by dialectical hermeneutics,³⁵ canon law was on its way to becoming a science distinct from theology.³⁶ Playing a supporting role in this was Bologna, whose 'revived' civil law, discussed in the next chapter, stimulated theory and practice.³⁷

Given these changes, scholars have long considered the period after 1070, shaped by the Investiture Contest and early scholasticism, a 'turning point' for the canon law. Integral to this view has been the reform-era papacy which, by appealing to ancient decretals,³⁸ and more recent conciliar decisions,³⁹

-
- 35 For example the Ivonian *Prologue*, on which see Bruce C. Brasington, *Ways of Mercy: The Prologue of Ivo of Chartres: Edition and Analysis* (Münster, Hamburg, London: LIT Verlag, 2004). This was the first treatise specifically dedicated to canonistic jurisprudence based on the principles of *caritas* and dispensation. Note also the dialectical structure, accompanied by *dicta* that anticipate Gratian's later comments, in Alger of Liege's *Liber de misericordia et iustitia*, on which see Robert Kretzschmar, *Alger von Lüttichs Traktat De misericordia. Ein kanonistischer Konkordanzversuch aus der Zeit des Investiturstreits* (Sigmaringen: Jan Thorbecke Verlag, 1985).
- 36 Stephan Kuttner, *Harmony from Dissonance. An Interpretation of Medieval Canon Law* (Latrobe: Archabbey Press, 1960), rp. in his *History of Ideas and Doctrines of Canon Law* (Aldershot: Ashgate, 1992), chapter 1. Perhaps no single text is more striking in this regard than Urban 11's decretal 'Duae sunt' which declares a law written on the heart by the Holy Spirit. Robert Somerville has seen no evidence to dispute its unprecedented creation of a dichotomy between public and private law and, in the spirit of the famous distinction between truth and custom—again, probably from Urban, finds it demonstrates a revolutionary understanding of canon law and its claim on the Christian. See Robert Somerville, "Canon Law, Inspired Law, and Papal Authority," in *Neti'ot Le David. Jubilee Volume for David Weiss Halivini*. (Jerusalem: Orhot Press, 2004), 119–34, also Giles Constable, *The Reformation of the Twelfth Century* (Cambridge: Cambridge University Press, 1998), 262–63, and Peter Leisching, "Consuetudo und ratio im Dekret und in der Panormia des Bischofs Ivo von Chartres," *ZRG KA* 74 (1988): 535–42.
- 37 Kenneth Pennington, "The Practical Use of Roman Law in the Early Twelfth Century," in *Handlung und Wissenschaft. Die Epistemologie der praktischen Wissenschaften im 13. und 14. Jahrhundert*, ed. Matthias Lutz-Bachmann and Alexander Fidora (Berlin: Akademie Verlag, 2008), 9, noting that terms can be easily misunderstood. He suggests that the practical use of the law, not merely the 'more philosophical understanding,' should be taken into account.
- 38 On the importance of Pseudo-Isidorian decretals in this regard, see the Introduction, also Kathleen G. Cushing, *Papacy and Law in the Gregorian Revolution. The Canonistic Work of Anselm of Lucca* (Oxford: Clarendon, 1998), especially 103–21.
- 39 Above all, Walter Ullmann, *Growth of Papal Government in the Middle Ages* (London: Methuen, 1955), *The Church and the Law in the Earlier Middle Ages* (London: Variorum, 1975), and *Jurisprudence in the Middle Ages* (London: Variorum, 1980).

revolutionized the canon law and laid the foundation for the 'imperial' papacy of the high Middle Ages.

Granted, there have always been critics of this thesis. Rudolf Sohm was surely one of the earliest.⁴⁰ While many scholars since his death in 1917 have challenged his argument that the revolution in canon law,⁴¹ a transition from a sacramental to positive law, only occurred after Gratian, some, especially theologians, have remained attracted to his ideas.⁴² It is only comparatively recently, however, that scholars have moved beyond simply refuting Sohm to reconsidering the traditional paradigm of Reform, Rome, and Revolution.

Most contemporary students of medieval law have learned 'Reform, Rome, Revolution,' through the work of Harold Berman.⁴³ What many, however, have not encountered is the body of criticism leveled at *Law and Revolution*. For example, Rudolph Schieffer criticized Berman's reliance on a 'couple of abstract measures' to analyze such a complex phenomenon as legal change.⁴⁴ Even more pertinent to this present study, he cautioned against Berman's

40 Rudolf Sohm, *Das Altkatholische Kirchenrecht und das Dekret Gratians* (Munich and Leipzig, 1918, rp. Darmstadt: Wissenschaftliche Buchgesellschaft, 1967).

41 On the differing views of periods of historical canon law by Sohm and his critic, Stutz, Ludger Müller, "Die Periodisierung der kirchlichen Rechtsquellen in der Auseinandersetzung zwischen Ulrich Stutz und Rudolph Sohm," in *Iuri canonico promovendo*, 621–44.

42 Bruce C. Brasington, "Avoiding the 'Tyranny of a Concept': Structural Considerations Concerning Twelfth Century Canon Law," in *Das Eigene und das Ganze. Zum individuellen im mittelalterlichen Religiosentum*, ed. G. Melville and M. Schürer (Münster, Hamburg, London: LIT Verlag, 2002), 419–38. On the difficulty of separating theology and canon law in the period, Martin Brett, "Canon Law and Litigation: The Century Before Gratian," in *Medieval Ecclesiastical Studies in Honour of Dorothy Owen*, ed. Michael J. Franklin, et al. (Woodbridge: Boydell, 1995), 21–40, also Herbert Kalb, "Überlegungen zur Entstehung der Kanonistik als Rechtswissenschaft-Einige Aspekte," *Österreichisches Archiv für Kirchenrecht* 41 (1992): 6–10. For an alternative to Sohm's view of how the Church developed institutionally and legally, Peter Landau, "Johann Lorenz von Mosheim über den Rechtszustand der frühen Kirche," in *Johann Lorenz Mosheim. Theologie im Spannungsfeld von Philosophie, Philologie und Geschichte 1693–1755*, ed. Martin Mulsow (Wiesbaden: Harrassowitz, 1997), 330–46. Landau compares and contrasts Mosheim's views on ecclesiastical legal development with Sohm's.

43 Harold Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard: Harvard University Press, 1983).

44 Rudolf Schieffer, "'The Papal Revolution in Law'? Rückfragen an Harold J. Berman," *BMCL* NS 22 (1998): 21. Such criticism is reminiscent of Elizabeth A.R. Brown, "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe," *The American Historical Review* 79.4 (1974): 1063–88.

assumption that the Gregorian papacy was somehow intentionally innovative, and that its decrees were necessary for the subsequent development of western law.⁴⁵

In light of such criticism, let us also reconsider the 'legal revolution' of the late eleventh century by turning our attention away from Bologna and Rome.⁴⁶ We shall consider French bishops, not popes and their legates.⁴⁷ The letters of Bishops Marbode of Rennes and Ivo of Chartres can expand our knowledge of what the *ordo iudiciarius* meant before the spread of civil-law jurisprudence from Bologna, Montpellier and other schools. Equally, they demonstrate that we should not view developments in ecclesiastical procedure largely in light of papal claims of primacy and power.

Marbode of Rennes

Best known for his lyric poetry and letters, both intensively studied for their style and erotic language, Bishop Marbode of Rennes (ca. 1035–ca. 1123) was praised by contemporaries as a master of Latin.⁴⁸ We know as well that he

-
- 45 Schieffer, "The Papal Revolution," 30, also Peter Landau, "Die kirchliche Justizgewährung im Zeitalter der Reform in den Rechtssammlungen," in *La Giustizia nell'alto medioevo*, (*Secoli ix–xi*) (Spoleto: Centro italiano di studi sull'alto Medioevo, 1997), 1.427. For a similar view considering Gratian's *Decretum* and how it may distort our understanding of legal change, Brett, "Canon Law and Litigation," 31, 39. Emphasis as well on Pope Gregory VII also distorts our understanding of the reform; in particular, it gives it a programmatic, teleological character that is anachronistic. A valuable, as yet unpublished, study on the 'Gregorian' label and its limitations is provided by Michael Richard Tivey, *Defining Ideology in the Pontificate of Gregory VII* (Masters of Philosophy Thesis: University of Birmingham, 2011).
- 46 Others have already done this as well. For example, on bishops' power in contemporary Italy, including their role as judges, Miller, "Religion Makes a Difference," 1100–01.
- 47 On the spread of the civil law in northwestern France in this period, Franck Roumy, "Excerpta Rotomagensia un des plus anciens témoignages de la diffusion du droit de justinien en France au xii^e siècle," in *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, 917–47. See also André Gouron, "L'enseignement du droit civil au xii^e siècle: De la coutume a la règle," in his *Juristes et droits savants*, cap. vii, 191–92.
- 48 *Marbodi episcopi redonensis opuscula aliquot*, ed. H. Boehmer, *MGH Ldl* 3.691–692. On Marbode, Richard W. Southern, *Scholastic Humanism and the Unification of Europe*, vol. 1 (Cambridge, MA: Harvard University Press, 1995), 188 and Antonella Degl'Innocenti, *L'Opera agiografica de Marbodeo di Rennes* (Spoleto: Fondazione CISAM, 1990), 78–80. An unpublished, valuable study is by Melissa Belleville Lurio, *An Educated Bishop in an Age of Reform: Marbode, Bishop of Rennes, 1096–1123* (PhD. Boston University, 2004).

had some experience as an ecclesiastical judge, for he served alongside several other bishops in 1098 in judging a dispute between two Angevin monasteries.⁴⁹ Stephan Kuttner also called attention to one of Marbode's letters that mentioned legal procedure. Writing to the hermit Ingungerius, who had been accused of heresy, Marbode expresses his relief that the accusation was unfounded. He then comments on how canonical judgment should take place:⁵⁰

Bad priests ought not be avoided unless after a canonical judgment. (Marbode) least of bishops, to Ingungerius, venerable priest and to the brothers who, with him, serve God: Greetings.⁵¹ I received your holiness' letter in response to our letter. Having read it, I rejoiced not a little, since I perceived that you thought and preached only those things that do not deviate from Catholic truth. For who does not know that all heretics generally ought to be avoided and detested? The sacred canons also show that priests who are fornicators ought to be deposed.⁵² However, this should never be done universally or without order. For the holy church, whose body's head is Christ,⁵³ has a distinction of members and diversity

49 Lurio, *An Educated Bishop*, 91–92.

50 Stephan Kuttner, "Marbode of Rennes on the *Ordo iudiciorum*," *Nachrichten der Akademie der Wissenschaften in Göttingen: I. Philosophisch-Historische Klasse*, 1992 nr. 1 (Göttingen, 1992): 1–6. The letter was edited by Boehmer in *MGH Ldl* 3.694.4–38, which is the text translated. Boehmer also noted all its sources. Kuttner believed the bishop had taken canons from the *Panormia*, traditionally attributed to Ivo of Chartres (*Panormia* 4.113 and 114), comparing the edition in PL 161.1206–1207 with collation of three Vatican manuscripts, Vat. Lat 1350, 1358, 1360 and Sebastian Brant's *editio princeps*. For a more recent edition of these canons, see the online provisional *Panormia* at <http://project.knowledgeforge.net/ivo/> accessed on 2 November 2012. Research has also shown that the *Panormia* cannot be directly attributed to Ivo, on which see below. Some of the canons used by Marbode also were available in other contemporary canonical collections. Fundamental on Ivo is Christof Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge: Cambridge University Press, 2010), 273 and nn. 122–123. See also Lurio, *An Educated Bishop*, 92–93.

51 Ingungerius and his fellow hermits may have been associated with Robert of Arbrissel. Marbode criticized Robert's preaching the *vita apostolica*, which attracted numerous followers, including women, see Constable, *The Reformation of the Twelfth Century*, 26 and, more recently, Bruce L. Venarde, "Power, Personality and Perversity? Robert of Arbrissel and his Critics," in *The Experience of Power in Medieval Europe, 950–1350* ed. Robert L. Berkhofer, Alan Cooper, and Adam Kosto, (Aldershot: Ashgate, 2005), 213–26.

52 Bernhard Schimmelpfennig, "Ex fornicatione nati: Studies on the Positions of Priests' Sons from the Twelfth to the Fourteenth Centuries," *Studies in Medieval and Renaissance History* NS. 2 (1979): 1–50.

53 Eph. 1.22–23.

of offices, so that one may not be allowed to usurp another's function with impunity. For, surely, not all members are the eye? Do all members speak?⁵⁴ Our Lord Jesus, speaking to one who had cried to him saying 'Master, tell my brother to divide the inheritance with me,' responded thusly: 'Man, who made me judge and divider between you?'⁵⁵ Therefore, many should not judge or speak, since indeed the tongue itself is not permitted to speak unless by order and with the proper word. Such is the constitution and the order of judges that,⁵⁶ though certain things may be true, yet he should not believe them unless declared by judicial order. In each judgment there should be four persons: plaintiff, defendant, witnesses, and judge.⁵⁷ You have it in the decretals that no judgment, unless made according to legal order, should be held.⁵⁸ For, besides the general judgment of things to be punished, the quality of persons requires proper discussion in its details. Does anyone therefore dare to disturb this constitution of order? Does anyone not permitted to judge dare usurp this license? For, as Scripture bears witness, the danger to the judge is greater than to the one he is judging. The Lord says in the Gospel:⁵⁹ 'Do not judge and you will not be judged.' And the apostle: 'Do not judge prematurely.'⁶⁰ Whence, we read from Blessed Martin:⁶¹ 'Judging no one, condemning no one.' And the Lord Jesus told those confident of their righteousness, and looking down on the rest, the parable about the Pharisee and the sinner, and added that the sinner was justified, not the Pharisee.⁶² For should you all, whom foolish and impertinent men, deceived by error, jabberingly call heretics, be cast out before a hearing? By no means! Therefore, do not, most beloved sons and brothers, condemn and abhor sinners but, with gentleness, correct and pray that God may convert them; or, if it is more expedient, accuse them before judges so that, convicted and

54 Compare 1 Cor. 12.12–27.

55 Luc. 12.13–14.

56 *Decreta Iulii papae*, c. 12 §15, <http://www.pseudoisidor.mgh.de/html/042.htm> accessed on 22 September 2012.

57 *Decreta Ps. Fabianus*, 2.32, <http://www.pseudoisidor.mgh.de/html/041.htm> accessed on 20 January 2014; [H. 22]. The requisite number of participants in the trial will also be a topic that will concern the *ordines*.

58 <http://www.pseudoisidor.mgh.de/html/133.htm> accessed on 20 January 2014.

59 Luc. 6.37.

60 1 Cor. 4.5.

61 *Decreta Iulii papae* c. 2 §15, 27 <http://www.pseudoisidor.mgh.de/html/133.htm> accessed on 20 February 2014.

62 Luc. 18.9–14.

confessed, they may be justly punished. Indeed, with God willing, there is now great concern that one not openly defend his own iniquity or, I say, argue that such evils as simony and fornication are good.⁶³ However, I know that you are able to gain what is good more by praying than disputing. May omnipotent God hear your holiness praying for us!

Marbode mixes Pseudo-Isidorian texts and the Bible.⁶⁴ However, detached from reference to an actual case, it is difficult to tell whether the Bishop of Rennes read these authorities in any legal sense. It seems more probable that Marbode is moralizing, providing pastoral counsel and comfort, not legal consultation. He condemns fornication and disorder, standard themes in the literature of the Reform and Investiture Contest.⁶⁵ Since only the court of public opinion had so far charged the hermit with heresy, there was no trial at stake. Thus, the 'judicial order' appears to mean that Ingungerius should have his say, and that everyone else should remember Christ's injunction to 'judge not.'

Bishop Ivo of Chartres' letters offer us more legal content and sophistication. They also comment on specific cases. Scholars have long considered Ivo (ca. 1140–1115) the outstanding canonist of his day. While he may have only compiled one canonical collection (his *Decretum*) and not three, as assumed until recently, his influence on the development of medieval canon law remains impressive.⁶⁶

-
- 63 On violence against clergy suspected of having committed simony, violence that could even extend to exhuming their bodies, Bruce C. Brasington, "Private Life in Canon Law Collections Attributed to Bishop Ivo of Chartres," in *Law and Private Life in the Middle Ages. Proceedings of the Sixth Carlsberg Academy Conference on Medieval Legal History 2009*, ed. Per Andersen, Mia Münster Swendson, and Helle Vogt, (Copenhagen: DJØF, 2011), 149–64.
 - 64 Kuttner argued that Marbode had also used the *Panormia* (on which see below), which he assumed, along with the rest of scholarship at the time, to have been compiled by Ivo of Chartres.
 - 65 Among many studies, I.S. Robinson, *Authority and Resistance in the Investiture Contest. The Polemical Literature of the Late Eleventh Century* (Manchester: Manchester University Press, 1978).
 - 66 Rolf Sprandel, *Ivo von Chartres und seine Stellung in der Kirchengeschichte* (Stuttgart: A. Hiersemann, 1962) and, more recently Rolker, *Canon Law and the Letters*. On current Ivonian scholarship, including provisional editions of the *Decretum*, most probably compiled by the bishop himself, the Pseudo-Ivonian *Tripartita* and *Panormia*, and information on his letters, see <http://project.knowledgeforge.net/ivo/> accessed on 5 January 2014, also Kéry, *Canonical Collections*, 253–59. Originally, three compilations, the *Decretum* (not to be confused with the earlier compilation of Burchard of Worms or Gratian's later

For more than a century, Ivo of Chartres has been viewed as a seminal figure in the development of canon law as a legal science.⁶⁷ However, scholars, with a few exceptions, have fixed their gaze on Bologna and Rome, respectively the academic and institutional futures towards which all things canonistic were progressing. In their view, Ivo was liminal, neither fully 'Gregorian' (the Roman trajectory of the canon law)⁶⁸ nor entirely 'scholastic' (the future of canonistic hermeneutics)⁶⁹ They have also regarded him as insufficiently informed by the civil law, piling in comparison with the trained jurists of the later twelfth century.⁷⁰

Ivo deserves a closer look. In particular, we should consider his knowledge and practice of procedure. To that end, a comparative approach, a consideration of what legal historians outside the orbit of the *ius commune* have said

compendium), the *Panormia*, and *Tripartita* were attributed to Ivo. Brett and Rolker have shown that only the *Decretum* likely came from Ivo himself. See Rolker, *Canon Law and the Letters*. On Ivo's influence, Linda Fowler-Magerl, "The Collection and Transmission of Canon Law Along the Northern Section of the *Via Francigena* in the Eleventh and Twelfth Centuries," in *Bishops, Texts and the Use of Canon Law Around 1100. Essays in Honour of Martin Brett*, ed. Bruce C. Brasington and Kathleen G. Cushing (Aldershot: Ashgate, 2088), 129–40. One may consider, for example, the area north of the pilgrimage road, the *Via Turonensis* or, even better, north of the Loire: the number of manuscripts of collections related at least to some extent to Ivo's *Decretum* is astonishing. Granted, other foundational, related, compilations are also at work in this extended region, notably those associated with the Arsenal collection; pride of place still goes to Ivonian-influenced canon law. How Ivo's letters also could be collected and transmitted in thematic groups to serve as legal reference works, Brasington, "Collections of Bishops' Letters," 76–85. For an earlier treatment of the Ivonian collections, prior to Rolker's analysis, Kéry, *Canonical Collections*, 244–60.

67 Paul Fournier, "Yves de Chartres et le droit canonique," *Revue des Questions Historiques* 63–64 (1898): 51–98, 384–405, rp. in his *Mélanges de droit canonique*, 2 vols., ed. Theo Kölzer (Aalen: Scientia Verlag, 1983), 1.679–748 and, for comparison, Berman, *Law and Revolution*, 202. More recently, scholars such as Rolker have emphasized Ivo's pastoral understanding of canon law, an understanding more in line with Gregory the Great's *Pastoral Rule* than contemporary papal concerns about hierarchy and jurisdiction. See, in particular, Rolker's, "Ivo of Chartres' Pastoral Canon Law," *BMCL NS* 25 (2002–2003): 114–45.

68 On Ivo's collections as 'not Gregorian,' Fournier, "Yves de Chartres," 405.

69 Martin Grabmann, *Die Geschichte der scholastischen Methode*, 2 vols. (Freiburg: Herder, 1911), 1.246.

70 Manlio Bellomo, *L'europa nell diritto commune*, 6th ed. (Rome: Il Cigno, 1989), 45. For more consideration of this view, see below in chapter 2.

about legal change,⁷¹ may be helpful. Let us reflect on what historians of the early English Common Law have said about procedure.⁷²

Consider this quote from F.W. Maitland:⁷³

When the medieval church is regarded as a political organism, as a state, it becomes very interesting. As a whole the constitution of this state may be unique, but there is hardly a feature in it for which we may not find analogies elsewhere.

Maitland was acutely aware of comparisons between the laws of crown and church.⁷⁴ The quote reflects his concern to enlarge his contemporaries' understanding of the sources of English legal development by turning their attention towards the canon law whose influence would grow markedly over time.⁷⁵ For our purposes, however, we should note as well his emphasis on the state, the institution of the Church. Such institutionalism assuming legislator, legislation, and intent, certainly could mirror at least to some extent to the 'revolution' in canon law, which has assumed Roman direction, with increasing help from Bologna and the schools she would inspire.

The paradigm of 'Reform, Rome, Revolution,' advanced by Paul Fournier in the late nineteenth century and championed by Berman, thus might be compared to Maitland's views on the history of English law. In critiquing Fournier's model, one could then look to alternatives to Maitland. Notable among these is the work of S.F.C. Milsom.⁷⁶ I suggest that some of his observations may be

71 In the following I am particularly indebted to the work of Dr. Robert Palmer available at <http://vi.uh.edu/pages/bob/elhone/elha.html> accessed on 3 February 2011.

72 See Charles Donahue Jr., *Why the History of Canon Law is Not Written* (London: Selden Society, 1986), taking Maitland as his inspiration.

73 Frederick W. Maitland, *Roman Canon Law in the Church of England. Six Essays*, (London: Methuen, 1898), 625.

74 Frederick W. Maitland, *The Constitutional History of England. A Course of Lectures Delivered by F.W. Maitland*, ed. H.A.L. Fisher (Cambridge: Cambridge University Press, 1908). On Maitland and his contemporaries, though not considering procedure specifically or the canon law, Wormald, *The Making of English Law*, 15–20.

75 Wormald, *The Making of English Law*, 20 and n. 94.

76 While I focus on Milsom's writings on the common law, it should be noted that he has written widely on other legal systems. See, for example, his essay on classical Rome "Law and Fact in Legal Judgment," *The University of Toronto Law Journal* 17.1 (1967): 1. Compare also Harries, "Resolving Disputes," 72, treating the 'living law' of late antiquity, shaped by social and cultural changes, not the learned jurists. That some scholars, notably Jolowicz,

instructive for the development of canon law, especially its procedure. Milsom emphasizes the court as the arena of legal change:

The most elegant of answers is no use until the question has been asked; and the point of this essay is that early lawsuits settle disputes without raising questions of substantive law and that progress depends upon procedural changes which allow such questions to emerge.⁷⁷

Milsom argues that legal change takes place most commonly neither at the legislator's throne nor in his court.⁷⁸ (For the purposes of this study, we might also add 'neither at the university nor school.') Rather, it is in the court of record where, through litigation and negotiation, change occurs.⁷⁹ Change comes not from the guiding hand of the legislator; rather, it ensues from pragmatic action in court, as advocates contest and judges rule.⁸⁰ That these efforts left little if no written record does not make them any less forceful or innovative.⁸¹ From this process came, gradually, rules, reflecting feudal society, to be recorded,

have argued that judges under the Empire promoted legal change, Metzger, "Roman Judges," 15–17.

77 S.F.C. Milsom, *A Natural History of the Common Law* (New York: Columbia University Press, 2003), 2.

78 Granted, the state, or proto-state, however primitive it may have been in the twelfth century, cannot be excluded. For discussion of Milsom and a persuasive argument for the Assize of Clarendon (1166) as a 'watershed' in the introduction of state power into what had previously been the private prosecution of wrongs, Paul Hyams, "Nastiness and Wrong, Rancor and Reconciliation," in *Conflict in Medieval Europe*, 206–18.

79 We also must remember the *ad hoc* nature of the secular court, at least in England in this period, on which see Keyser, "Agreement Supercedes," 54. The *audientia* was probably little different, at least in its *ad hoc* characteristic.

80 Again, consider Palmer, <http://vi.uh.edu/pages/bob/elhone/elha.html> accessed on 3 February 2011: 'For Milsom, then, large-scale and interesting legal change occurs in a non-purposive manner. The individual act, of course, has a purpose, but the results of the act exceed by far the intended result. The law thus develops without "legislative" shaping.' See also Paul Brand, *The Making of the Common Law* (London: Bloomsbury Academic, 2003), 205, 219. For my part, I believe Ivo and his contemporaries had far more flexibility than what was available to their successors later in the twelfth century, bishops increasingly confronted, and constrained, by papal legates, judges-delegate, and barrages of papal decretals. Discussing Milsom, Palmer, and Hyams on legal procedure, Stephen D. White, "Inheritances and Legal Arguments in Western France, 1050–1150," *Traditio* 43 (1987): 44–103, *rp.* in his *Feuding and Peace-Making in Eleventh-Century France*, chapter vi with same pagination.

81 Wormald, *The Making of English Law*, 483.

organized, taught, and debated.⁸² Procedure spurs legal change. Accordingly, let us search for it in Ivo's letters,⁸³ which concerned courts and cases far removed from Rome and Bologna.⁸⁴

Despite invoking it in various letters, Ivo of Chartres never defines the *ordo iudiciarius*. Often, his view seems little different from Marbode's. Letter 259, written to Archbishop Radulf of Rheims on behalf of Ivo's former monastery, St. Quentin of Beauvais, illustrates this.⁸⁵ Composed late in Ivo's life (ca. 1113–1115), the letter defended the abbot of St. Quentin against the Bishop of Amiens, who had accused him of failing to maintain a mill.⁸⁶ Ivo urged the archbishop to temper his judgment and, invoking a maxim from Isidore of Seville that the law should be 'just, possible, and suitable to both time and place,' referred to the *ordine iudiciario*.⁸⁷ (It is worth noting that there may be an allusion here to prescription as Ivo, defending the monks, refers to their forty-five year undisturbed possession of the mill.)⁸⁸

Other letters give more insight into Ivo's thought concerning procedure. In letter 166, written in the early twelfth century, he treated the case of Matilda. Originally betrothed to the royal chamberlain Waleran of Senlis, she had been seized against her will by Pons, nephew of the Bishop of Troyes.⁸⁹

Ivo, by the grace of God minister of the church of Chartres, to Humbaldus, by the same grace bishop of Auxerre. Greetings. Your grace should know that last summer, when Lord Bruno, Bishop of Segni, was acting as apostolic legate, Hugh the White was there in his presence and related to him how Pons, nephew of the Bishop of Troyes, had taken in marriage his daughter, Matilda, despite her tearful resistance. Matilda had been

82 Commenting on Milsom, Ralph V. Turner, "Who Was the Author of Glanvill? Reflections on the Education of Henry II's Common Lawyers," *Law and History Review* 8.1 (1990): 120.

83 Fronteau's seventeenth-century edition is in PL 162. For a critical review and, now, the standard study of the letters' transmission, Rolker, *Canon Law and the Letters*.

84 Granted, Ivo also frequently had to deal, and not always harmoniously, with papal legates. They complicated legal disputes. Among many studies, most recently Kriston R. Rennie, *The Foundations of Medieval Papal Legation* (London: Palgrave-Macmillan, 2013).

85 PL 162.263D–264C, on which see Rolker, *Canon Law and the Letters*, 197 n. 155 also noting this maxim in letter 189.

86 Such disputes were legion. Compare, for example, a contemporary conflict between monasteries over a forest, Belle Stoddard Tuten, "Politics, Holiness, and Property in Angers, 1080–1130," *French Historical Studies* 24.4 (2001): 201–19.

87 PL 162.264A–C. Compare also *Isidori hispalensis episcopi etymologiarum*, 5.21.

88 PL 162.264B. For more on prescription, see chapter three.

89 Ep. 166 (PL 162.169A–170A), discussed by Rolker, *Canon Law and the Letters*, 172 and n. 36.

previously betrothed to Galeran, chamberlain of the king. As both parties were absent, the Bishop of Paris was charged by the aforementioned legate to summon both to a hearing on a suitable day and, after the arguments from both sides had been heard, with the counsel and judgment of prudent men to end the controversy between Pons and Matilda. On his return, the Bishop of Paris fixed the date and time for Pons and Matilda and invited me and my fellow bishops to discuss and judge in Christian love. On the appointed day, the plaintiffs and the defendant, along with witnesses and judges, met at Paris to hear the case. Matilda was asked when she had refused marriage with Pons. She responded briefly that she was not legitimately joined to him, since she had first been betrothed to Galeran by her parents and then, though objecting to him with all her might, with her mother also unwilling, was joined to Pons. When Pons was then ordered to respond to the accusations, he sought a certain diversion by not responding, and then improperly left the meeting to which had presented himself. He then was ordered time and again that he should not delay either to respond to the accusations or hear the judgment. Since he thus avoided judgment, he was judged by apostolic decree, because one absent ought not to benefit from the sentence's delay. Then, with opinions offered from the authority of both civil and canon law, since the witnesses for the woman against Pons could prove under oath that she had objected, (it was decided) she should be free from Pons and thus could marry in Christ whomever she wished. Pons was further ordered to come to hear these oaths, in order to legally object against the persons of the witnesses or their statements.

Since Matilda had resisted and Waleran had died, Ivo judged she should marry whomever she wanted. She had not consented to Pons; her marriage to him was void.⁹⁰ Ivo noted as well that witnesses had declared the marriage forced. The original betrothal thus stood. He notes how Pons avoided judgment by neither responding to summons nor appearing at court, delaying tactics which the *ordines* will treat at length. The *ordines* will also consider exceptions raised concerning witnesses. Since Pons had not followed these commands, he had defaulted. Unfortunately, Ivo never states which civil and canonical sources he had in mind.⁹¹

90 On this letter and Ivo's emphasis on consent for valid marriage, Rolker, *Canon Law and the Letters*, 213 and n. 11.

91 Rolker, *Canon Law and the Letters*, 214 nn. 13, 14, calling attention to Dig. 23.1.7 (also found in Ivo's *Decretum* and the *Collectio Britannica*), cited in a similar context in Ep. 167

Ivo is more forthcoming in letter 274. Writing to Pope Paschal II, the bishop declared:⁹²

To Paschal, supreme pontiff, Ivo, humble minister of the church of Chartres, with complete obedience and full joy of salvation. Prevented by bodily infirmity, I was unable to be present at the dispute between myself and the abbot of Marmoutier which you had commanded to be tried before (Cono) the bishop of Praeneste, legate of the apostolic see.⁹³ Nevertheless, to your legate and bishops, whom the former had called together to judge this case, I sent my secretaries⁹⁴ and letters to refute the calumnious objections of the monks.⁹⁵ When the monks were unable to weaken the truth of the letters by any judicial order, but not yet burdened by any judgment or decision delivered against them, they called me, though absent and ill, to the apostolic see. They did this not out of confidence in justice but, rather, to cause delays since through my secretaries I wished to dedicate myself to rendering void the charges made against me and also to prove, by means of the judicial order, those responses I had made by letter against their unjust objections, provided a suitable time and fitting place might be granted my infirmity. That I may conclude briefly the summary of the truth, your holiness should know that these monks held no investiture of that church (which is the point of this controversy) either in whole or in part, unless by invasion or theft. When this invasion of the church had been brought to the attention of lord Hugh,

(PL 126.170). Scholars have long reflected on such citations of the civil law, on which see Rolker, *Canon Law and the Letters*, 130 and n. 18, citing Carl Friedrich von Savigny, *Geschichte des römischen Rechts im Mittelalter*, 5th ed., 7 vols. (Heidelberg 1834–44, rp. Aalen: Scientia Verlag, 1986), 2.317 and 400 and, for an earlier study that assumed Ivo also compiled the *Panormia*, Landau, “Die kirchliche Justizgewährung,” 446–47. That Ivo might have seen the *Digest* during a visit to Rome is suggested by Mario Ascheri, *The Laws of Late Medieval Italy. Foundations for a European Legal System*, (Leiden: Brill, 2013), 58.

92 PL 162.276B–277C.

93 On Ivo and Marmoutier, Sprandel, *Ivo von Chartres*, 148–50 and Rolker, *Canon Law and the Letters*, 13–14.

94 On *responsales*, Alexander Souter, *A Glossary of Later Latin to 600AD*. (Oxford: Oxford University Press, 1996), 353. The word appears, for example, in Nov. 79.1. See Cimma, *L'episcopalis audientia*, 136 and n. 11.

95 That *calumniae* could also mean ‘complaints,’ without any apparent pejorative sense, White, “Disputes in Eleventh-Century France,” 285–86.

bishop of Die, then legate of Pope Gregory VII,⁹⁶ he freed the aforesaid church from those monks' depredations by means of his letters and then, with the canons there serving apostolic authority, left it quit.

The letter describes a typical dispute. Couched in the humble phrases essential to what Geoffrey Koziol has called 'the language of the suppliant,'⁹⁷ Ivo defends himself and asks for papal approval. Such petitions were typical: bishops and abbots were constantly disputing with one another, and their lay and ecclesiastical patrons.⁹⁸ The monks of Marmoutier had failed to challenge Ivo's letter of defense.⁹⁹ Without a legal challenge, they had failed, as far as the bishop was concerned, to follow the *ordo iudiciarius*. (Again, Ivo anticipates a topic we shall find in the *ordines*. As in the previous letter, failure to appear, against which Ivo had defended himself, as we saw above, is highlighted.) While he never uses *exceptio*, or cites legal authorities in reference to it, it is clearly what he meant. References to the burdens of age and illness could convey appeal to an exception, not merely excuses.¹⁰⁰ Ivo noted as well that he had sent both letters and messengers to communicate his situation. Again, the *ordines* will treat this procedural requirement. His exasperated comment on the monks' strategy of delay also will echo in coming chapters.

Letter 280 cites Roman law. Ivo wrote to Bishop Lisidard of Soissons concerning an archdeacon whose sister had been charged with adultery and sentenced to the ordeal. Ivo replied that the ordeal was against the judicial order.¹⁰¹ To support his position, he drew upon a *Novel*:¹⁰²

96 Reg. IX, Ep. 15. In general, Kriston Rennie, *Law and Practice in the Age of Reform. The Legatine Work of Hugh of Die (1073–1106)* (Turnhout: Brepols, 2010).

97 Koziol, *Begging Pardon and Favor*, 45–46, also 143–44, and part four of this work on the 'multifaceted' nature of ritual.

98 Ivo's contentious correspondence with Abbot Geoffrey of Vendôme illustrates this, for example, letter 195, PL 162.204. The letters between bishop and abbot are treated by Michel Grandjean, *Laïcs dans l'Église: Regards de Pierre Damien, Anselme de Cantorbéry, Yves de Chartres* (Paris: Beauchesne, 1994), 310–37 and Bruce C. Brasington, "What Made Ivo Mad? Reflections on a Medieval Bishop's Anger," in *The Bishop Reformed*, 209–18.

99 PL 276B.

100 On similar language, compare Abbot Hariulf's narrative in chapter 2 and, for exceptions due to infirmity and age, chapter 3, the *De edendo*.

101 Ep. 280: PL 162.281A–282A The letter was written around 1096. On Ivo's concerns about the ordeal, Bruno Lemesle, "L'enquête contre les épreuves. Les enquêtes dans la région angevine (xii^e début xiii^e siècle)," in *L'enquête au moyen âge*, 48, within a broader discussion of the increasing use of episcopal legal examination instead of recourse to ordeals.

102 Nov. 117. See Rolker, *Canon Law and the Letters*, 337, noting this is a dublette in the Ivonian *Decretum*. (ID 8.111, 16.161). The text is an *authenticum* from the *Epitome Juliani*, k 391,

To Lisidard, by the grace of God bishop of Soissons, from Ivo, by the same grace humble minister of the church of Chartres, that he keep watch over those sheep entrusted to his pastoral care. Your archdeacon, the son of lord Névelon of Pierrefond,¹⁰³ came to us along with other honest brothers and diligently asked how, having consulting the laws, he could free his sister from the infamy with which the Count of Soissons, her husband, had hatefully accused her. After hearing this, it seemed to me that this charge neither concerned the judicial order nor summoned her to lawful purgation. Indeed, the institutes of *Novels*, which the Roman Church commends and keeps, state that a man suspected by a husband may not be handed over to punishment or convicted because he wishes to accuse his wife of indecency unless, with the support of three suitable witnesses, the husband claims three times that he himself had not had any familiar relations with his wife in their own home or another. With this done, if he found them in a private place, with three suitable witnesses testifying about the rest, then the man could be summoned to judgment or be duly punished. Otherwise, neither the secular nor divine laws concede that someone could become guilty solely on the basis of conjectures,¹⁰⁴ and your prudence knows well that the condition of both accusers and witnesses ought to be inoffensive, so that nothing may be done from enmity, nor should a reprehensible accuser charge another person. However, the count freely testifies that he called her to the test of the hot iron or to trial by combat, things the ecclesiastical laws rather prohibit than command. Whence (Pope) Stephen, writing to Luitbert, bishop of Mainz:¹⁰⁵ 'The sacred canons do not judge that confession should be extracted from someone by means of the examination of hot iron or water, and what is not sanctioned by the record of the holy fathers should not be presumed by superstitious invention. Where there is voluntary confession or crimes have been publically declared with the approbation of witnesses then, with fear before the eyes of God, those are committed to the ruler to judge. However, hidden or unknown matters must be reserved to the

accessed at http://droitromain.upmf-grenoble.fr/Corpus/epitome_julien_2.htm#105 on 5 January 2014. It does not appear in the *ordines* examined in this volume.

103 On Névelon, Marcel Pacaut, *Louis VII et les élections épiscopales dans le royaume de France* (Paris: Vrin, 1957), 139 and n. 1.

104 This will be an important issue in *ordines* that consider presumption, for example the *Ordo Bambergensis* in chapter five.

105 Robert Bartlett, *Trial by Fire and Water. The Medieval Judicial Ordeal* (Oxford: Oxford University Press, 1986), 74–75.

judgment of the One who alone knows the hearts of the sons of men.¹⁰⁶ Accordingly, Pope Nicholas I also says¹⁰⁷ 'We do not accept trial by combat as law, for we do not find that it was received (by the church), though we do read that certain ones did this, just as sacred history shows (by the example of) holy David and Goliath;¹⁰⁸ yet never did divine authority sanction it elsewhere to be held as law, since those who do this seem merely to tempt God.' From these and other statements of this kind it is apparent that the aforementioned count cannot convict his wife of adultery unless there is a valid number of witnesses, and he had not shown her conjugal charity, or rendered the conjugal debt. I could reply with more things in this fashion but I judge that these suffice. Farewell.

Ivo does more than cite the *Novel* in passing. He integrates it into his argument against both the charge and ordeal. His multiple references to witnesses and their suitability and how they are to be tested before a judge all refer to the civil law. Ivo assumes its applicability, indeed, suitability, to the case. Again, the *ordines* will treat this as well.

Letter 258, to Pope Paschal II, presents an equally interesting discussion of procedure.¹⁰⁹

To Paschal, supreme pontiff, Ivo humble minister of the church of Chartres with the son's love and a subject's obedience. Since at the apostolic seat both mercy and justice flourish, all oppressed in any way humbly ought to take recourse to it so that there each and every one may receive either a just judgment for the truth of matters or pious solace from apostolic moderation. Thus, on bended knees of the heart, we beseech your excellency to reserve to your audience alone the case of the lord bishop of Senlis, Hubert, where a rash mob may not frighten, no princely violence compel but, instead, the truth alone according to the testimony of his own conscience may defend what is presented and proved. We know indeed that in former years, when the lord Richard, bishop of Albano was performing the apostolic legation, that he celebrated a council

106 Compare Rev. 2.23.

107 Again, Bartlett, *Trial by Fire*, 18.

108 Bartlett, *Trial by Fire*, 118. How later, twelfth-century canonists and theologians struggled with similar, problematic texts in the Old Testament, for example Samson's death, Bruce C. Brasington, "Non imitanda set veneranda: The Dilemma of Sacred Precedent in Twelfth-Century Canon Law," *Viator* 23 (1992): 135–52.

109 Ep. 258 (PL 162.263B–D).

at Troyes. There malevolent and envious men accused Hubert of the crime of selling sacred orders (simony) but, because of lack of accusers, the bishops agreed that this accusation was not proven. However, the aforementioned bishop, desiring to avoid the infamy of such a crime, at the judgment of your legate, as those testify who were there, voluntarily purged himself of the crime with which he had been accused and further proved his innocence by swearing an oath. Afterwards, we understand that this case was decided according to the judicial order and, according to the tenor of the laws, ought not be repeated.¹¹⁰ However, since final judgments ought to be referred to the apostolic see so that it may impose the ultimate decision, and that he might confirm the things he stated under oath through honest persons, Hubert presses us and others favorable to him that justice be observed concerning him so that his innocence may not be endangered. This, we hope, the apostolic see would do anyway without our intervention. Yet we desire that the wishes of our mouth be approved by Her.¹¹¹

Writing after the legate council of 1104 held by Bishop Richard of Albano, Ivo reported that the charge of simony against Bishop Hubert of Senlis had failed to go to trial because of a lack of accusers.¹¹² Nevertheless, in order to clear his name completely, the bishop had willingly taken an oath before the legate. Ivo emphasized that, while final judgment should be reserved to the papal see, he saw no reason for re-trial because the matter had been decided by the judicial order and, following the 'tenor of the civil laws,' ought not to be judged again. Ivo furnished valuable detail about process in his comments on why the accusation had not come to trial and the bishop's subsequent oath, his *purgatio canonica*.¹¹³

Ivo was not the first to question a second accusation and retrial. Both had attracted attention early on in canon and civil law. Jerome had commented on *Nahum* 1.9 when arguing that God did not judge twice. This text later appeared in Gratian and would figure in the dispute between Becket and Henry II.¹¹⁴ The

110 PL 162.263C.

111 Ps. 118.108.

112 E 258: PL 162.263B–264C.

113 R.H. Helmholz, *The Spirit of the Classical Canon Law* (Athens: GA: The University of Georgia Press, 1996), 158–59.

114 Again, Helmholz, *The Spirit*, 287. The text appears at various places in Gratian's *Decretum*, for example D 81 c. 12, C 13 q. 2 c. 30, and C 23 q. 5 c. 6. See also Richard M. Fraher, "The Becket Dispute and Two Decretist Traditions: The Bolognese Masters Revisited and Some

Roman law tradition had been established by maxims such as *ne bis idem* that first appeared in the late Republic.¹¹⁵ A particularly important formulation by the jurist Ulpian, though in corrupted form, was subsequently preserved by the *Digest* 43.29.3.13.¹¹⁶ Save when the accuser had lied, a second accusation was invalid. By the late third century, a more concise formulation, lacking the reference to lying, appeared in the *Sententiae Pauli*, I.6.BI.¹¹⁷ Pseudo-Isidore then brought this into the canon law via *Benedictus Levita* 163, 291.¹¹⁸ Ivo subsequently drew from this collection for his *Decretum* at 16.319. This was probably the text he cited.¹¹⁹

As in the preceding letter, Ivo had no difficulty referring to civilian procedure when commenting upon an ecclesiastical dispute. Letter 258, to my knowledge never discussed in the abundant literature on the topic of double jeopardy in medieval canon law, demonstrates this willingness to apply the Roman law. Here, Ivo anticipates the jurists, both civilian and canonist, who later in the twelfth century would treat the issue at considerable length during the Becket conflict.¹²⁰

Why did Ivo turn to civil law? Was it merely to demonstrate the extent of his learning, a few 'proof texts' cited in passing? I do not think so. Given the profound concern Ivo had for justice and mercy, a concern reflected throughout his writings, there is far more at work in these scattered citations. He wanted cases to be resolved, whether his own or those under the jurisdiction of others. All available legal texts deserved consideration. If Ivo did not have

New Anglo-Norman Texts," *Journal of Medieval History* 4 (1978): 347–68. Neither author discusses Ivo of Chartres.

- 115 Michael C. Alexander, "Repetition of Prosecution and the Scope of Prosecutions in the Standing Criminal Courts of the Late Republic," *Classical Antiquity* 1.2 (1982): 141–66, also Berger, *Encyclopedic Dictionary*, 374 and Mousourakis, *Historical and Institutional*, 371. The key text is Dig. 50.17.57: *Bona fides non patitur, ut bis idem exigatur*. Interestingly, none of the *ordines* considered in this present study take up this procedural point.
- 116 Peter Landau, "Ursprünge und Entwicklung des Verbotes doppelter Strafverfolgung wegen desselben Verbrechens in der Geschichte des kanonischen Rechts," *ZRG KA* 56 (1970): 128–29, also Helmholz, *The Spirit*, 287–89.
- 117 Landau, "Verbot doppelter Strafverfolgung," 132–33. Paulus was pretorian prefect under the Emperor Septimius Severus and one of the last, great Roman jurists.
- 118 Landau, "Verbot doppelter Straverfolgung," 135–36. The *Benedictus Levita* contained forged capitularies. A critical edition is available at <http://www.benedictus.mgh.de/haupt.htm> accessed on 30 May 2015.
- 119 Another influential civil law text, a decree of the Emperor Honorius (Cod. 9.2.9), prohibiting a second accusation of someone for the same crime, is not found in the Ivonian *Decretum*. See also Helmholz, *The Spirit*, 288.
- 120 In general, Fraher, "The Becket Dispute."

the knowledge of the civil law commanded by university-trained jurists later in the twelfth century, he had had enough to see when it could apply.¹²¹ His recourse to the civil law illustrates legal change.¹²²

Ivo of Chartres and Marbode stood on the cusp of the transition towards professional law during a 'long twelfth century'.¹²³ While not trained specialists in civil or canon law, as measured by later standards,¹²⁴ these bishops were expected to be well-read and at least somewhat familiar with the law. This had been true for centuries. But circumstances were changing. Whatever their degree of legal education, they were caught up in an increasingly bureaucratic and communicative ecclesiastical and secular, government.¹²⁵ Such 'users' of the law, both canon and sometimes civil, were important. Those who followed them would be the authors and audience of the *ordines*.

As Susan Reynolds notes:¹²⁶

What Roman law offered to practice . . . was not merely a method of rational argument . . . but a whole mass of prescriptions and distinctions from Justinian's Corpus that the prestige of Rome made authoritative. Once dug out of the texts, they stimulated those trained in argument to work out principles . . .

Ivo 'dug out' these texts and applied them. As we shall see, others would dig even deeper and more widely. If the Bishop of Chartres lacked the sophistication of the jurists soon to come from Bologna and elsewhere, this should not

121 Compare Brett, "Canon Law and Litigation," 33.

122 Alan Watson, "Legal Change: Sources of Law and Legal Culture," *University of Pennsylvania Law Review* 131.5 (1983), rp. in his *Legal Origins and Legal Change* (London and Rio Grande: Bloomsbury Academic, 2003): 71–74 though also counseling against focussing on innovation.

123 Susan Reynolds, "The Emergence of Professional Law in the Long Twelfth Century," *Law and History Review* 21.2 (2003): 348, also comments concerning Reynold's thesis applied to England by Paul Brand, "The English Difference: The Application of Bureaucratic Norms within a Legal System," *Law and History Review* 21.2 (2003): 383–87. See also Keyser "Agreement Supercedes," 64.

124 Fransen, "Les collections canoniques," 8, translated by Brett, "Canon Law and Litigation," 34–35.

125 Even the most philosophical of bishops was not free from these burdens, on which see Mark Philpott, "'In primis . . . omnis humanae prudentiae inscius et expers putaretur:' St. Anselm's Knowledge of Canon Law," in *Anselm. Aosta, Bec and Canterbury. Papers in Commemoration of the Nine-Hundredth Anniversary of Anselm's Enthronement as Archbishop, 25 September 1093*, ed. D.E. Luscombe and G.R. Evans (Sheffield: Sheffield Academic Press, 1996), 94–105, also comparing Anselm with Ivo of Chartres.

126 Reynolds, "The Emergence of Professional Law in the Long Twelfth Century," 351–52.

diminish his achievement in applying Roman practice to the canonistic *ordo iudiciarius*. Again, Susan Reynolds:

Doing things differently from either ancient Roman or modern lawyers is not necessarily the mark of confusion or lack of legal technique. Adopting new words may be a sign of trying out new ideas so as to adapt them to different conditions, which is surely an intelligent thing to do . . .

The important point is not whether Ivo or any of his contemporaries used the Roman law well, though I believe he did, but that he turned to it.¹²⁷ It met the needs of his legal advice concerning two cases. Like those who would follow him in referring to the civil law for study and application in court, Ivo was 'opportunistic'.¹²⁸

No single point of view captures the history of law, canon or otherwise, and its moments of change. Still, Milsom's emphasis on procedure, action in the court, deserves consideration in the formation of the *ius commune*. Whether or not the phenomenon deserves the dramatic title of 'revolution,'¹²⁹ courts, both sacred and secular, were becoming increasingly concerned with process,¹³⁰ and were turning to the learned law of Roman antiquity and examining canon law with new interest and critical acumen.¹³¹ A 'proceduralist society' was appearing,¹³² a subject to which we shall return in the conclusion. For now, I believe it not too much to argue that Ivo's recourse to the civil law, more than learned display, was an early indication of this process at work.¹³³ Ivo anticipated the *ordo iudiciarius* that soon would evolve under the influence of civil and canon law. The *ordines* would be the next step.

127 On Reynolds' article, Piotr Górecki, "A View from a Distance," *Law and History Review* 21.2 (2003): 370.

128 R.C. Van Caenegem, *European Law in the Past and the Future. Unity and Diversity over Two Millennia* (Cambridge: Cambridge University Press, 2002), 81–83 on 'opportunistic' use of the civil law. See also Górecki, "A View," 371, again commenting on Reynolds.

129 It is worth noting that Berman never mentions Milsom.

130 On the 'interplay' of rules and process in this period, commenting also on the works of Hudson and Wickham, Keyser, "Argument Supercedes," 46 and n. 15.

131 Meens, "Argument Supercedes," 65.

132 Dominique Bauer, "The Twelfth Century and the Emergence of the juridical subject—Some Reflections," *ZRG KA* 121 (2004): 214.

133 Another indication of the growing interest in procedure around 1100 are numerous canons from *Panormia* 5, which largely concerns process, in the English *Leges Henrici Primi*, on which see Bruce C. Brasington, "Canon Law in the *Leges Henrici Primi*," *ZRG KA* 123 (2006): 288–305.

The Early Romano-Canonical Process: The Worlds of Hariulf and Bulgarus

Ecclesia vivit lege romana (Lex Ribuaria 61§1)

‘The Church lives by the Roman law.’¹ To what extent was this maxim true around 1100? As we saw in the Introduction, from Constantine onwards the civil law had taken the ecclesiastical court into account. In turn, the canon law drew upon the terminology and practice of Roman procedure and preserved them, if incompletely, in numerous compilations. The passage of time, however, had taken its toll on legal knowledge.² We have seen that Ivo of Chartres was not unaware of civilian procedure; yet the impression from his letters is that he had some familiarity with it, not any deep or extensive learning. He ‘turned to’ the civil law. He was not a jurist. Moreover, Ivo was an exception; his contemporaries were far less expert in the written law, whether secular or sacred.³ So apparently impoverished was legal theory around 1100 that some scholars have even gone so far to state that there was no jurisprudence at all.⁴

- 1 On *Ecclesia vivit lege romana*, among many studies, Helmholz, *The Spirit*, 17, also Siems, “Begrifflichkeit in Reginos Sendhandbuch,” 77. R.W. Southern, *Scholastic Humanism and the Unification of Europe Foundations*. (Oxford: Blackwell, 1995) 243 even states that ‘Roman law had left no imprint,’ save in the Languedoc.
- 2 On the ‘simplified’ ecclesiastical procedure in the early Middle Ages, Fowler-Magerl, *Ordo*, 9.
- 3 On the increasing expertise in law, however, held by clerics both at secular and ecclesiastical courts in the early twelfth century, Keyser, “Agreement Supercedes,” 64.
- 4 Reviewing views pro and con, Herbert Kalb, “Überlegungen zur Entstehung der Kanonistik als Rechtswissenschaft—Einige Aspekte,” *Österreichisches Archiv für Kirchenrecht* 41 (1992): 1–2. A good example of the negative view is Manlio Bellomo, *The Common Legal Past of Europe 1000–1800*, tr. Lydia G. Cochrane (Washington: Catholic University of America Press, 1995), chapter 2. On evidence for legal knowledge in the period, for example glosses to an eleventh-century Italian canonical collection, Bruce C. Brasington, “A Note on Selected Glosses to the Collection in v Books (Vat. Lat. 1339),” *BMCL. NS.* 25 (2002/03): 9–14, also “Prologues to Canonical Collections as a Source for Jurisprudential Change to the Eve of the Investiture Contest,” *Frühmittelalterliche Studien* 28 (1994): 226–42, and Somerville and Brasington, *Prefaces to Canon Law*, chapters 1–2. See also Wormald, *The Making of English Law*, 468–69, commenting on the views of Radding concerning the role of Pavia in the recovery of the Digest. He was unconvinced. On how ‘judicial practice and ideology combined customary and institutional elements,’ elements only glimpsed, thus making it very difficult

Even if one does not take such a dire view, even the briefest comparison between the scattered Roman-law texts in eleventh-century works and the entire *Corpus iuris civilis* shows the scant and uneven knowledge of civil law, especially outside Italy.⁵ Passing phrases and isolated excerpts highlight how little was known, let alone understood. If the maxim quoted above were to be more than the echo from a distant past for the ecclesiastical forum the *Digest*, which left only a very few, faint traces in the early-medieval west,⁶ needed renewed study and reintroduction to the court.⁷

In the early spring of 1076 two Tuscan monasteries came to court concerning a grant of land. While such disagreement was typical, the ensuing litigation was not.⁸ For one of the advocates, Pepo, 'a man learned in the law,' cited the

for us to understand how the law actually worked in society, Keyser, "Agreement Supercedes," 86. His comments about secular courts can, I believe, be applied as well to the ecclesiastical forum.

- 5 On its increasing availability and use in Italy, also referring to the Marturi Case, Chris Wickham, *Courts and Conflict in Twelfth-Century Tuscany* (Oxford: Oxford University Press, 2003), 117.
- 6 Against an earlier argument by Stephan Kuttner that the *Digest* was cited as late as 679 at a Roman synod, Wolfgang Kaiser, "Zur angeblichen Benutzung der Digesten auf einer römischen Synode des Jahres 679," *ZRG KA* 99 (2013): 341–46. Kaiser argues that Kuttner's argument does not hold and that the last citation occurred during the pontificate of Gregory the Great. On the 'rediscovery' of the *Digest* in the late eleventh century see, among a vast amount of scholarship, Müller, "The Recovery of Justinian's Digest," 2 and n. 3, also n. 1, reviewing earlier scholarship, including critics of Charles Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna, 850–1150* (New Haven and London: Yale University Press, 1988), who had argued that Pavia, not Bologna, had played the decisive role in the *Digest's* reception. For an example of Radding's subsequent responses to his critics, see his essay—critiquing the views of Susan Reynolds—"Legal Theory and Practice in Eleventh-Century Italy," *Law and History Review* 21.2 (2003): 377–81. For the Codex Florentinus and the *Digest's* transmission, Peter Weimar, "Die legistische Literatur und die Methode des Rechtsunterrichts der Glossatorenzeit," in Coing, *Handbuch*, 1.158–59. On glosses to the Lombard law as evidence of procedural knowledge, Charles Radding, "Petre te appellat martinus. Eleventh-Century Judicial Procedure as Seen Through the Glosses of Walcausus," in *La Giustizia nell'alto medioevo*, 827–61.
- 7 Noting, however, the theological and overall reductionist error of 'reducing' legal procedure, (granted in the context of the communes, not the ecclesiastical court), to 'the question of how far it used Roman law,' Wickham, *Courts and Conflict*, 3–4.
- 8 Our knowledge of legal procedure in Italy in this period is often very incomplete. Noting the rapid decline of the public *placita* in the course of the eleventh century and the lack of records concerning arbitrations until the early twelfth century, Wickham, *Courts and Conflict*, 8–9, also 29.

Digest. It is commonly labeled the ‘Marturi Case’ after the castle located near the winning party, the monastery of Saint Michael:⁹

S. In the name of Christ. This brief memorandum is to be retained in memory for future times how in the presence of Nordillus, representative of Lady Beatrice, duchess and marchioness, and the Vice-Count John, . . . d . . . residing with them, the judge, Guilielmus, Pepo, a man learned in law, Rudolph, son of Segnorius, Roland, son of Rusticus, Aldibertus, son of Baruncellus, Stefanus, son of Petronus, Benzo, son of Benzus, and Sengorittus, son of Bontius, all men of good memory, and many more, John, advocate of the church and the monastery of Saint Michael located at the castle which is called Martulus (Marturi), along with the dean Gerard of the same church and monastery declared against Sigizo of Florence concerning certain lands and the church of Saint Andrew located at Pavia which had belonged to Winzio, son of Hugo, of good memory. John presented a charter by which Winzio had granted those lands of the Margrave Hugo, and another charter stating that the Margrave Hugo had given those properties to the monastery.¹⁰ To this assertion, Sigizio objected, stating the prescription of time, that the lands had been possessed by him and his father for a period of forty years. The party of the monastery, in turn, opposed this exception by offering a replication,¹¹ affirming that during this time the suit had been declared.¹² Then, with three suitable witnesses produced, namely John, advocate of the aforementioned church, Stephen, the son of Petronus,

9 *Forschungen zur Reichs-und Rechtsgeschichte Italiens*, 4 vols., ed. Julius Ficker (Innsbruck: Wagner, 1874) 4-73.

10 On charters designed to prevent such challenges (*chartae promissionis/repromissionis*), Wickham, *Courts and Conflict*, 29. These were, however, private, not public, an additional sign of the *placitum*'s decline. Certainly one was not mentioned here; undoubtedly, if available (authentic or forged), it would have been employed by one of the parties.

11 On *infirmitas*, opposing an exception to an argument, and *replicatio*, a plaintiff's response to a defendant's exception, Berger, *Encyclopedic Dictionary*, 501, 675. See also below in Bulgarus' letter to Haimeric.

12 This would render appeal to prescription, unchallenged and uninterrupted possession, invalid. See below and also other *ordines* in this volume. On the classical law, Dieter Nörr, *Die Entstehung der longi temporis praescriptio. Studien zum Einfluß der Zeit im Recht und zur Rechtspolitik in der Kaiserzeit* (Cologne and Opladen: Westdeutscher Verlag, 1969) and, more recently, though without treating either the Marturi case or the *ordines*, Andreas Piekenbrock, *Befristung, Verjährung, Verschweigung und Verwirkung: Eine*

of good memory, and Adilbert, son of Baruncellus, of good memory, they stated that abbot John had declared in court to the Margrave Boniface concerning the aforementioned lands and the abbot Guidricus to Duke Godfredus and the Countess Beatrice. They promised that they would so swear. Additionally, the aforementioned abbot John, touching the holy books of the Gospels, swore as above.¹³ Stephen and Adlibert desired to swear as well, but both parties agreed that the advocate's vow sufficed. When these were finished and the law in the books of the *Digest* considered, where the praetor¹⁴ promises that when no magistrate was present the condition at the beginning of the trial would be restored.¹⁵ the aforementioned Nordillus, representative of Lady Beatrice,¹⁶ restored completely concerning the suit the church and monastery of Saint Michael, with all right lost concerning the lands and those properties of Winzio's concerning Pavia the Margrave Hugo had granted and conferred

Rechtsvergleichende Grundlagenstudie zu Rechtsänderungen durch Zeitablauf (Tübingen: Mohr Siebeck Verlag, 2006).

- 13 Bulgarus will also discuss swearing on the Gospels, on which see below. This act was not confined to touching the Bible. On the practice of holding or touching charters in the early Middle Ages, Georges Declercq, "Between Legal Action and Performance. The *firmitas* of Charters in the Early Middle Ages," in *Medieval Legal Process. Physical, Spoken and Written Performance in the Middle Ages*, ed. Marco Mostert and P.S. Barnwell (Turnhout: Brepols, 2011), 55–73. See also Lupoi, *The Origins of the European Legal Order*, 438–57.
- 14 Dig. 4.6.26.4. On how later medieval legists would translate, interpret and apply to their own world the offices of praetor and proconsul, see Susanne Lepsius, "Prätor und Prokonsul—Übersetzungsleistungen und Neuschöpfungen der mittelalterlichen Legisten im Umgang mit den römischen Ämtern," in *Science politique et droit publique dans les facultés de droit européennes (XIII^e–XVIII^e siècle)*, (Frankfurt am Main: V. Klostermann 2008), 223–50.
- 15 On *restitutio in integrum*, in general, Mousourakis, *Historical and Institutional*, 219 and, for the late-antique civil law, Ernst Levy, "Zur Nachklassischen in Integrum Restitutio," *ZRG RA* 68 (1951), reprinted in his *Gesammelte Schriften*, 2 vols., ed. Wolfgang Kunkel and Max Kaser (Cologne and Graz: Böhlau Verlag, 1963), 1.446–92. On this passage in Bulgarus, Litewski, *Zivilprozeß*, 488 and n. 42, comparing also the *De edendo*, on which see chapter 3.
- 16 The term is *missus*. On the comital *missi*, with their origins in the Carolingian period, though treating Brittany, not Tuscany, Wendy Davies, "People and Places in Ninth-Century Brittany," in *The Settlement of Disputes in Early Medieval Europe*, ed. Wendy Davies and Paul Fouracre (Cambridge: Cambridge University Press, 1986), 74; in the same volume, discussing the Carolingian prehistory of disputes such as the Marturi Case, Chris Wickham, "Land Disputes and their Social Framework in Lombard-Carolingian Italy, 700–900," 105–24.

to the church of Saint Michael. This judgment took place in the year of Our Lord Jesus Christ's Incarnation 1076, in March, the fourteenth indication. With rejoicing! It was done in the castle called Martuli, by the parish of Saint Mary, in the territory of Florence. I, Nordilus, happily confirm these statements in writing.

In the murky history of the *Digest's* recovery, the Marturi case has long attracted attention.¹⁷ Scholars have disagreed on whether the *Digest* was correctly understood.¹⁸ Some have focused on the mysterious Pepo, putative founder of the law school of Bologna.¹⁹ Drawing from cosmology, Kenneth Pennington even has declared the trial to be part of the 'Big Bang' creating the *ius commune*.²⁰ Others have taken a less dramatic view. While noting the

-
- 17 A good summary and analysis are provided by Antonio Padoa Schioppa, "Le Rôle du droit savant dans quelques actes judiciaires italiens des xi^e et xii^e siècles," in *Confluence des droits savants et des pratiques juridiques*, (Milan: Dott. A. Giuffrè, 1979), 349–52; see also, more recently, Ascheri, *The Laws*, 91–93, summarizing the case, and Witt, *Two Latin Cultures*, 170.
 - 18 Discussing the conflicting views of Hermann Kantorowicz, Emilio Cortese, and others, *The Corpus Iuris Civilis in the Middle Ages: Manuscripts And Transmission from the Sixth Century to the Juristic Revival*, ed. Charles M. Radding, et al. (Leiden and Boston: Brill, 2007), 183–84. On Marturi, Ascheri, *The Laws*, 62, noting the *Digest's* citation was spurred by practice in litigation, a point stressed below in this chapter. See also the comments on earlier scholarship by Schioppa, "Le Rôle," 352 and n. 37.
 - 19 Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 45–46, also Bellomo, *The Common Legal Past*, 59–60 and Ennio Cortese, "Theologie, droit canonique et droit romain. Aux origines du droit savant (xi–xii siècle)," *Académie des inscriptions et belles lettres comptes rendues des séances* 146.1 (2002): 62–65. See also Witt, *Two Latin Cultures*, 235–46.
 - 20 Kenneth Pennington, "The 'Big Bang': Roman Law in the Early Twelfth Century," *Rivista internazionale del diritto comune* 18 (2007): 43–70, available also at <http://faculty.cua.edu/pennington/BigBangRomanLaw.htm> accessed on 20 February 2014, also Paul Hyams, "Due Process versus the Maintenance of Order in European Law: The Contribution of the *ius commune*," in *The Moral World of the Law*, ed. Peter Cross (Cambridge: Cambridge University Press, 2000), 62–66. For a survey, sometimes contentious, of earlier scholarship on the revival of civilian jurisprudence, Bellomo, *The Common Legal Past*, 237–40. Compare Anders Winroth, "The Teaching of Law in the Twelfth Century," in *Law and Learning in the Middle Ages. Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History 2005*, ed. Helle Vogt and Mia Münster-Swendsen (Copenhagen: DJØF, 2006), 41–62, also Brundage, *Medieval Origins*, 80–85. Arguing that this moment marked the collapse of an earlier 'common law' and thus, was a crisis, not a revival, renaissance, or "progress," Lupoi, *The Origins of the European Legal Order*, 3.

importance of the *Digest*'s rediscovery, they have emphasized that the daily life of the law, negotiations of arbiters, advocates, and judges, appears largely unchanged.²¹ As Chris Wickham has observed for late eleventh-century Italy, the role of bishops in dispute resolution was varied, and not at all shaped, at least explicitly, by Roman procedure.²² In such scholars' view, there was neither sudden transition to civilian procedure nor abandonment of extra-judicial negotiations in favor of formal proceedings in court.²³ Regardless of the position one takes concerning Marturi, it cannot be denied that it points towards the future. Change, if not rapid, was underway, and this was driven by concern for sophisticated and effective procedure.²⁴ And this meant the civil law. With a bang or not, the learned, civilian process had begun to be recovered in its

-
- 21 Wickham, *Courts and Conflict*, 9, also 36, discussing a case from Lucca ca. 1124 that judged 'non tantum secundum leges, et iura iudicaturis, sed si aliter placeret,' Wickham notes that *leges* probably still meant the old Carolingian-Lombard system of law, more arbitrations than anything like the later civilian *ordo iudicarius*. Compare Susan Reynolds, "The Emergence of the Professional Law in the Long Twelfth Century," *Law and History Review* 21.2 (2003): 347–66, discussing the many possible ways Roman law terms and concepts appeared over time in eleventh and twelfth century legal documents alongside older terminology. She argues against a 'teleological' understanding of the gradual professionalization of legal knowledge and practice under the influence of the civil law; older practices did not suddenly vanish, for the practitioners of the law, advocates, notaries, and others, are no less important than the learned jurists teaching in Bologna. See also Amelia J. Uelmen, "Symposium: The Legal Profession Looking Backward: A View of the Legal Profession from a Mid-Twelfth-Century Monastery," 71 *Fordham Law Review* (2003): 1521–22. Finally, Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2004), 171 and n. 88, notes how 'terse' the early citations of the civil law were, also 196 for the gradual 'entanglement' of the civil and canon law. See also his essay "Roman Law and the *Panormia*," in *Bishops, Texts, and the Use of Canon Law Around 1100. Essays in Honour of Martin Brett*, ed. Bruce C. Brasington and Kathleen G. Cushing (Aldershot: Ashgate, 2008), 183–90. On legal study outside of Bologna, Peter Classen, "Italienische Rechtsschulen ausserhalb Bolognas," in *Proceedings Berkeley*, 202–21 and Anders Winroth, "Law Schools in the Twelfth Century," in *Mélanges Anne Lefebvre-Teillard*, 1057–64. That the process at Marturi did not resort to judicial combat is also noted by Ascheri, *The Laws*, 93.
- 22 Wickham, *Courts and Conflict*, 30–31, on Lucca, emphasizing how bishops and nobles assisted in settling disputes by an 'informal tradition,' either by a formal trial or arbitration.
- 23 Susan Reynolds, "Rationality and Collective Judgment in the Law of Western Europe before the Twelfth Century," *Quaestiones Medii Aevi Novae* 5 (2000): 3–19.
- 24 A point emphasized by Wormald, *The Making of English Law*, 469.

entirety. From it would soon come ‘profession and professionalism’²⁵ borne on a tide of schools, glosses, and learned commentaries.²⁶

Let us return to the ecclesiastical forum around the time of Marturi. How canonists responded to civil law procedure in the period of the *Digest’s* reception can be gathered from changing views on the calumny oath. The *sacramentum de calumnia*, where the plaintiff swore that the suit was being brought justly, without deception, had been standard in the classical law.²⁷ While it had faded away in the early Middle Ages, the practice reappeared shortly after the millennium.²⁸ By the middle of the eleventh century, the Lombard law accepted the calumny oath.²⁹ At the same time, however, some had become concerned about clerics taking it.³⁰ Emperor Henry III accordingly had forbidden clergy to swear the oath.³¹ His ruling demonstrated both piety and a secure

-
- 25 Michael H. Hoeflich and Jasonne M. Grabher, “The Establishment of Normative Legal Texts. The Beginnings of the *Ius commune*,” in *The History of the Medieval Canon Law in the Classical Period, 1140–1234. From Gratiano to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann, et al. (Washington: Catholic University of America Press, 2008), 1. For the civil law, in particular, André Gouron, “L’enseignement du droit civil au xii^e siècle: De la coutume à la règle,” in *Manuels, programmes de cours et techniques d’enseignement dans les universités médiévales*, ed. J. Hamesse, (Turnhout: Brepols, 1994), 183–99, rp. in his *Juristes et droits savants: Bologne et la France médiévale*, (Farnham: Variorum, 2000), chapter vii. On the contribution of Bulgarus’ treatment of *regulae iuris* to disputational instruction in the law, see below.
 - 26 Gero Dolezalek, “Research on Manuscripts of the Corpus Iuris with Glosses Written During the 12th and Early 13th Centuries: State of Affairs,” in *Miscellenae Domenico Maffei*, 1.143–71.
 - 27 Cod. 2.58. De iureiurando propter calumniam dando. For the oath in classical procedure, Mousourakis, *Historical and Institutional*, 317. Advocates also had to take the oath, on which see James Brundage, “The Advocate’s Dilemma: What Can You Tell the Client? A Problem in Legal Ethics,” in *Medieval Church Law and the Origins of the Western Legal Tradition. A Tribute to Kenneth Pennington*, ed. Wolfgang Müller and Mary E. Sommar (Washington: Catholic University of America Press, 2004), 203–204. On *calumnia* as a procedural offense in the classical law, Robinson, *The Criminal Law of Ancient Rome*, 99–101. For the twelfth century, Nörr, *Prozessrecht*, 51, 112–15, also Peter Landau, “Jurisprudenz und Fälschung in Köln im 12. Jahrhundert. Die Kölner Institutionenglosse,” *Rivista Internazionale di Diritto Comune* 22 (2011): 26–27 and n. 108.
 - 28 James Brundage, “The Calumny Oath and the Ethical Ideals of Canonistic Advocates,” in *Proceedings Munich*, 796–97.
 - 29 Wickham, *Courts and Conflict*, 117, also Brundage, *Medieval Origins*, 292–93.
 - 30 For a slightly earlier period, Austin, “Burchard of Worms,” 943–44, noting that Burchard of Worms took the position that, despite the danger of perjury, laymen could take the oath.
 - 31 On knowledge of the civil law in Henry’s entourage, Witt, *Two Latin Cultures*, 170.

assumption that he had a degree of supervision over the clergy. Soon, the papal reform would challenge that.³²

Over the next few decades, despite Henry's prohibition, it was increasingly required.³³ By the early twelfth century, Pope Honorius II, considering the same imperial edicts cited by Henry III, now declared that clerics could swear the oath if ordered by their superiors.³⁴ Honorius' decretal demonstrates how Rome was coming to grips with civilian procedure:

Standing firmly in the footsteps of our predecessors who say that the supreme pontiff must decide more serious questions we, having diligently sought the counsel of our brethren and with God's help, firmly decided the point of this case. We found that it is thus stipulated by the laws that 'no cleric should presume to swear an oath.' However, elsewhere one finds it written that all principal parties in the beginning of the trial ought to swear the oath concerning calumny. On account of this, many have come to doubt whether a cleric should offer an oath or be allowed to delegate this duty to another person. Since it appears, however, that the constitutional edict prohibiting clerics from swearing was promulgated by Augustus to Constantine, the praetorian prefect,³⁵ concerning the clergy of Constantinople, thus one believes it does not apply to other clerics. We desire that all doubt concerning this be removed concerning the decision made by our son Henry, former emperor, which states:

We confirm thus his interpretation and decree that the constitution of the emperor Marcus ought to be thus understood as pertaining to all the clergy of the churches. For, since the emperor Justinian decreed by

32 *MGH Legum, cap. Sect. IV*, 1.96.29–97.3. The decision relied on Nov. 119.1 and Nov. 122. See Fowler-Magerl, *Ordines iudicarii*, 44. On Henry III and the Church, among many studies, Uta-Renate Blumenthal, *The Investiture Controversy*, 49–58. On Henry's piety, Horst Fuhrmann, *Germany in the High Middle Ages, c. 1050–1200*, tr. Timothy Reuter (Cambridge: Cambridge University Press, 1986), 38–40, though not discussing this edict.

33 Brundage, "The Calumny Oath," 798.

34 Honorius II (JL 7401, X 2.7.1). Pope from 1124–1130, Honorius reigned in the aftermath of the Concordat of Worms which, at least officially, ended the conflict between empire and papacy begun decades earlier in the pontificate of Gregory VII. His decretals and legates attest to vigorous leadership.

35 On the judicial authority and power of the pretorian prefect in late antiquity, for example his ability to hear appeals and to judge as the emperor's representative, Mousourakis, *Historical and Institutional*, 366. There could be no appeals from his judgment.

law that the canons of the Fathers ought to have the force of law, and it is found in many canons that clerics should not dare to swear an oath, it is fitting that the whole clerical order be free from swearing the oath concerning calumny. Moreover, according to Us, the tenor of the imperial statute is understood accordingly: preserving the intention of both divine and human law, we decree and establish by unbreakable imperial authority, that no bishop, priest, or cleric of any order, no abbot, monk or religious woman be compelled for any reason to swear an oath in any legal dispute, whether criminal or civil. Instead, if he knows (that swearing an oath) would benefit his church, he may delegate this duty to other, suitable, defenders.

Yet, we add this regulation: a bishop who has not consulted the Roman pontiff or a cleric, his superior, may not dare to swear an oath. To all bishops and, generally, priests and clergy, We order that this be so observed: if anyone should go against this constitution, he shall know that he is denied mercy, not taking as an example or practice from us what we recently judged in the case of our brothers and fellow bishops of the churches of Arezzo and Siena, when we assented to their will and request.³⁶

Honorius' ruling on the oath can be read, of course, in many ways. Given the papacy's insistence in the supremacy of canon law, product of ecclesiastical reform and the Investiture Contest,³⁷ it makes sense that the pope would challenge an imperial decision that had presumed to regulate the legal behavior of clergy and monks.³⁸ No less probable was the recognition that the civil law aided both the theory and practice of papal power.³⁹

36 On this dispute, which had its own share of argumentation from Roman law, Kenneth Pennington, "Roman Law at the Papal Curia in the Early Twelfth Century," in *Canon Law, Religion and Politics. Liber Amicorum Robert Somerville*, ed. Uta-Renate Blumenthal, et al. (Washington: Catholic University of America Press, 2012), 241–48, noting that Haimeric, the papal chancellor, was also involved in the case.

37 Fried, "Die römische Kurie," 173 arguing that it was, in fact, Gregory VII's resistance to the German bishops that initiated papal reflection on the *ordo iudiciorum*. See also Gerd Tellenbach, *The Church in Western Europe from the Tenth to the Early Twelfth Century*, tr. Timothy Reuter (Cambridge: Cambridge University Press, 1993), 316–18.

38 Arguing for a strong legal orientation already under Pope Gregory VII, Beate Schilling, *Guido von Vienne-Papst Calixst II*, (Hannover: Hansche Buchhandlung, 1998), 558, also mentioning Haimeric and Bulgarus, though without consideration of any use of Roman law in papal documents and letters.

39 Pennington, "Roman Law," 236–38, also van Caenegem, *European Law*, 76. For evidence of increased use of Roman law by 1107 in a case involving the Roman monastery of

Mastering the civil law would take time. While instructional works were being prepared by 1100,⁴⁰ the scope and sophistication of classical procedure challenged even the most enthusiastic student.⁴¹ The integration of Romanist, learned procedure into the ecclesiastical process would be no less daunting, even if, as early as Pope Urban II (1088–1099) there are references to it in papal documents and, by his successor, Paschal II (1099–1118), we glimpse some knowledge of the *Digest*.⁴² As the following illustrates, however, ecclesiastical procedure did not rapidly change, even at Rome, despite increasing study of the *Corpus iuris civilis*.

Abbot Hariulf's Visit to Rome

In 1141, Hariulf, abbot of Oudenburg in Flanders, travelled to the papal court. His description of the papal consistory helps us to understand better the audience of Bulgarus' letter to Haimeric, the final text in this chapter, and how far removed curial procedure was from what was being taught at Bologna and elsewhere in the middle of the twelfth century.⁴³

Saints Cosmas and Damien, Antonio Padoa Schioppa, "Il ruolo della cultura giuridica in alcuni atti giudiziari italiani dei secoli xi e xii," *Nuova rivista storica* 64 (1980): 265–85 and, more recently, Ascheri, *The Laws*, 46–47.

40 For example, a Pavian 'model constitution' intended to instruct notaries on how to prepare documents correctly and a 'Compendium' from southern France which briefly describes the participants in trials, see Fowler-Magerl, *Ordines*, 24–25 and 162–63; on these and other contemporary works, Litewski, *Zivilprozeß* 20–21. On the challenges facing the early students of the *Digest*, Manlio Bellomo, "Der Text erklärt den Text. Über die Anfänge der mittelalterlichen Jurisprudenz," in *Der Codex in Gebrauch*, ed. Christel Meier, et al. (Munich: Wilhelm Fink, 1996), 64, also Hermann Fitting, *Die Institutionenglossen des Gualcausus und die übrigen in der Handschrift 328 des Kölner Stadtarchivs erhaltenen Erzeugnisse mittelalterlicher Rechtskultur* (Berlin: Guttentag, 1891), 64–74, 122–29, also Fowler-Magerl, *Ordo iudiciorum*, 33–35.

41 Pennington, "The 'Big Bang,'" 43–70. For another view, Susan Reynolds, "Rationality and Collective Judgment," 18–19.

42 Fried, "Die römische Kurie," 166.

43 Renée Nip, "The Dispute of Hariulf of Oudenburg and the Abbey of Saint Médard: A Convenient Confusion of Names," in *Media Latinitas. A Collection of Essays to Mark the Occasion of the Retirement of L.J. Engels*, ed. R.I.A. Nipp, et al., (Turnhout: Brepols, 1996), 275–80, also Brundage, *Medieval Origins*, 151–54, 157–61, and Fried, "Die römische Kurie," 162–63, 166. My translation is based on the edition by Ernst Müller, "Der Bericht des Abtes Hariulf von Oudenburg über seine Prozessverhandlungen an der römischen Kurie im Jahre 1141," *Neues Archiv* 48 (1930): 101–15. For recent study of the text, though not from a

Here begin the deeds of Hariulf, abbot of Saint Peter's of Oudenburg, against the abbot of Saint Médard of Soissons, done at Rome in the presence of Pope Innocent II and the cardinals. Upon coming to Rome, Abbot Hariulf worshipped at Saint Peter's basilica on the first day. On the second day, he went to the Lateran palace and, according to the command from the bishop of Noyon, first sought an audience with Lord Haimeric, the supreme chancellor, a man most experienced and skilled in the ecclesiastical laws and rules of the palace.⁴⁴ He requested counsel and aid from Haimeric, saying 'O Lord, our most venerable lord, the bishop of Noyons and Tournai, rightly wishing you well, desired that I be sent to your excellency that I might first offer you my service and then to proceed, according to your counsel, before the lord pope to explain the full reason for my coming. For, although to the lord pope the examination of every case pertains, to you is rightly assigned, 'the chariots of Israel and his horsemen,'⁴⁵ since you regulate all things, deciding lesser matters and directing greater ones. Thus, coming to you, I desire and request that I might gain your benevolent counsel and thus obtain the result of justice and truth. The chancellor replied 'Brother, rather, father, it is fitting I serve you, not you, me, for your venerable presence and honorable old age equally demonstrate your good works.⁴⁶ Thus, I ask that you beware, lest the darts of modesty strike you or, through you, us.' Frightened, the abbot said 'For my part, for the sake of God, I came in all modesty to you but, newly arrived and utterly ignorant, undertook nothing before you, whence to you or, rather, from me, as you please, all modesty may proceed.' That one responded 'Since your age is an honor to all and your words are gentle and eloquent we are greatly pleased.⁴⁷ Thus, we are concerned and greatly desire to take counsel with you fully, so that you may spread a pleasing odor through every place and that also you may silence such vile talk, current everywhere: 'everything is for sale at Rome.'⁴⁸ Instead, men may then declare 'all things are most just at Rome.' And this is what I first stated,

legal perspective, Thomas Haye, *Lateinische Oralität. Gelehrte Sprache in der mündlichen Kommunikation des hohen und späten Mittelalters* (Berlin: De Gruyter, 2005), 83–93.

44 On this passage highlighting Haimeric's position, I.S. Robinson, *The Papacy, 1073–1198. Continuity and Innovation* (Cambridge: Cambridge University Press, 1990), 94–95 and 189–90 for a summary of Hariulf's account.

45 11 Kings 13:14.

46 Perhaps an echo of *Song of Solomon*, 2:14.

47 Nip, "The Dispute," 275, noting that Hariulf was at least eighty years old.

48 The editor notes this as an allusion to Sallust, *Bellum Iugurthum*, 35. On corruption at the curia, Robinson, *The Papacy*, 188, with reference to Ivo of Chartres' letter 87 (PL 162.108B).

since all modesty should remain with us, if we either act justly towards you with gifts having been given or, not given. We emphasize this. I warn you neither to give nor promise anything to another person in the Roman palace. For, if I come to know that you did this, you will have neither our counsel nor the aid of the lord pope. Truly, we greatly strive to keep that venomous snake of venality away from us.⁴⁹ 'The abbot said 'I should be greatly foolish if, going against your command, I deprived myself of your counsel. Yet, coming to the presence of the lord pope, what or how much ought I offer as gifts?' The chancellor said, 'Far be it for you that you offer something there!' Hearing these things, the abbot greatly rejoiced, for he was not prepared to give a gift to the pope.⁵⁰

Then the chancellor Haimeric, taking the abbot by the hand, led him to the consistory of the palace where the lord pope was sitting in tribunal,⁵¹ with the cardinals at his right side.⁵² The nobler Roman courtiers,⁵³ hair curled and dressed in silk, were either standing around the pope or sitting. Seeing the chancellor coming in, however, they immediately arose and made a place for him. The abbot immediately prostrated himself and, with eyes and lips intent on the task, kissed the pope's feet.⁵⁴ Perceiving, however, how devotedly and with pious affection the abbot comported himself, the pope, with outstretched hand, raised him up, kissed him, and asked 'Brother, who are you; whence, or for what reason, have you come to us? It seems unseemly that a man of such an age be forced to come to Rome.' The abbot replied, 'O Lord, it would be very unseemly, save that the burden of a suit has compelled me. Yet the great importance of this case enabled me to endure the sea voyage. Indeed, I am that abbot from Flanders, whom the lord abbot of Saint Médard of Soissons has harshly attacked wishing, indeed, very unjustly to submit our house to himself.' The pope said 'Will you be able to show that it is unjust?' The abbot replied, 'With God's help, I confess and anticipate

49 Behind this lurks anxiety about simony.

50 Proof of Hariulf's virtue and avoidance of any hint of simony.

51 See below, where Bulgarus also mentions that the judge sits. On this, Litewski, *Zivilprozeß*, 462.

52 That other contemporary reports refer to the cardinals as sitting with the pope in judgment, Robinson, *The Papacy*, 113.

53 The term, *calamistrati*, is pejorative and suggests effeminacy. See Lewis and Short, accessed at the Perseus Project, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3atext%3a1999.04.0059> on 20 January 2014.

54 On the meaning of such ritual behavior, though not specifically applied to the papal court, Koziol, *Begging Pardon and Favor*, 60–67, also 302–03 on kissing the feet.

I shall be able to show it.' Then the abbot offered letters from the bishop of Noyon and the abbot (Bernard) of Clairvaux. The pope then said 'Is that one, dearest brother, to Us, sound?' The abbot, not clearly understanding what the pope was asking, said 'We left those men healthy and unimpaired.' The pope said 'Thanks be to God.' Then the pope said to the abbot 'Now go and see to your lodging. Tomorrow or the day after, you shall come to us and we shall hear you.' Then the bishops present declared 'He is truly worthy of an audience.' These included the archbishop of Saint Rufina (Silva Candida),⁵⁵ the bishops of Ostia, Segni, Ferentino, Viterbo-Toscannella, and also many abbots, all of one voice in declaring that the lord pope was treating the abbot mercifully. However, the Roman nobles said 'By the Lord God, he sinned greatly who forced such an elderly man to be so importuned.'

After having given reverence to the pope, the abbot retired and went to a lodging not far from the palace. During the following days, he regularly came to the palace, both entering and going from the gatherings of the pope or cardinals, since he was greatly desiring to have his case heard by the Lord Pope. Often, the pope said to the abbot with a cheerful and friendly face 'O Lord Abbot, how are you?' The abbot would respond 'O Lord, all is well and, indeed, it shall be even better if your mercy takes notice of me.' The Pope replied 'Stay strong and do not grow weary for, to the extent we are able, you shall have your desire. It is not the custom of our court that a venerable person coming here be quickly sent back; rather, in fact, by remaining and walking among us, he may learn what he did not know and also experience Roman discipline.' The abbot said 'O Lord, if you are delaying me for this reason, I am glad of it, and shall rejoice; yet I fear that my empty purse will not let me stay long.' The pope said 'Keep your money, for I shall see that your needs are provided for and, for the length of your stay, you shall be able to live with us.' With face cast down, the abbot replied, 'For such an offer I am grateful.' The cardinals, the chancellor Haimeric, Gerard of the Holy Cross of Jerusalem, Ivo of Saint Laurence, Guido of Pisa, Gregory (Censius),⁵⁶ along with other higher clerics, often spoke with the abbot. The abbot especially urged them to suggest to the lord pope and, by this, insist, that, taking pity, he appoint a place and day for him. These clerics publically declared 'Truly, O Lord, if it please you, we are moved to hear such a worthy man and to give his case due measure.'

55 Müller, "Der Bericht," 103 nn. 2–6 gives names and dates of tenure for each.

56 Again, Müller, "Der Bericht," 104 nn. 1–5 gives names and dates of tenure for each.

Finally, on the ninth day after his arrival, the Lord Pope appointed for him a day and place, the latter, in his chamber. When the cardinals were gathered, the abbot was led in and ordered to sit on the footstool at the pope's feet, where the chancellor was also sitting.⁵⁷ Then the lord pope said to the abbot 'Truly, brother, we pity you and are sorrowed since you greatly struggle against the force of age and are very weary. Behold, for your sake we have called together our brothers, before whom you should relate the reasons for your coming to us and we, willingly listening, shall decide the necessary counsel.' Venerating the pope, the abbot said 'O Lord Father, I thank the Omnipotent Lord who has sent this sweetness into your heart,⁵⁸ that you deign to show such favorable piety to me. Yet you should more openly know my anguish, so that you may not judge my story which I shall recount unworthy to hear.

A young man openly married a woman in all freedom, a woman whom he cherished in the same free status and held in marriage for 35 years and five months. Then, suddenly, a fierce adversary says to the husband,⁵⁹ now elderly, 'You will be my serf, since your wife belongs to me as a servant.' To whom the husband, once a youth and now aged, replies 'Since none of your fathers were ever my master, why do you think you are my lord?' Puffed up with pride, the man said 'By my own effort I acquired you, since the Roman pontiff placed your neck under my yoke.' To him, the man replied 'If the lord pope placed your yoke on my neck, it is still just a possibility and not fact. Indeed, I am certain that he did thus out of ignorance. Thus it remains for me to go to the lord pope and, if it be so, to bring it to naught.' Enraged, the other replied 'You, a dying man, will bring it to naught? You are getting your last meals, yet you will seek the Roman curia?' The old man replied 'Clearly, concerning your lies I shall plead against you and the fraud you have contrived and, in the presence of the Romans, shall set them before your face.'⁶⁰ To this point the story,

57 That such a seat was a high honor, Koziol, *Begging Pardon and Favor*, 302–03. On the abbot's rhetoric here, and the careful preparation behind the address that follows, Haye, *Lateinische Oralität*, 86. That the chamber was a 'clearly defined space' is discussed by Sara Noethlichs, "Das päpstliche Konsistorium im Spiegel der Quellen des 11. bis 13. Jahrhunderts," *ZRG KA* 94.1 (2008): 279–80.

58 Müller, "Der Bericht," 104 n. 6, citing Ex. 15:25: at ille clamavit ad Dominum qui ostendit ei lignum quod cum misisset in aquas in dulcedinem versae sunt ibi constituit ei praecepta atque iudicia et ibi temptavit eum.

59 The tense shifts to the present.

60 Müller, "Der Bericht," 105 n. 1 noting, for example, Ps. 49. 21: haec fecisti et tacui existimasti futurum me similem tui arguam te et proponam te ante oculos tuos.

whose explanation follows, appears true. The young man marrying the woman chooses the abbot of Oudenbourg,⁶¹ who, at a young age, had been canonically promoted to abbot freely and absolutely, that is without deception or defect of any contradiction. Then, in the 35th year of his ordination, the lord abbot of Saint Médard of Soissons arose, a man stirred up as much by his own zeal as by the underhanded treachery of two clerics, Rodulfus and Goduinus, and procured from the Roman pontiff a false letter,⁶² which compelled the abbot of Oudenbourg to depart from his own place. Not considering that there was any deception in this, nor judging that the abbot of Saint Médard wanted to lie to him, he gave the letter that was requested, which was delivered to the abbot of Oudenbourg on the first day of August.⁶³ Perceiving and discerning the rudeness and evil of such a fraud, that man (the abbot), hastened to the presence of the Lord Pope Innocent and, with eloquent truth, exposed the plots of the abbot of Soissons against him.

After these matters were heard, the pope grieved for both men, but in different ways. He grieved for the abbot of Oudenbourg because of his unjust weariness and, for the abbot of Soissons, since the ancient enemy had been able to bind his heart with such a great fraud.⁶⁴ When these things were finished, the pope said 'We have heard your story and its explanation and we judge what your zeal is striving for, that there be no divorce done by us of a wife who has been married so long.' The abbot said 'If I was wrongly married (to my monastery), I do not reject divorce; however, if married correctly, who shall separate us?'⁶⁵ It is more for us to destroy evils than to scatter things established in Christ! The pope said 'On the day of your arrival you promised, concerning the abbot of Saint Médard, to prove that he was opposing you unjustly. Thus, state your case and tell us by which saint's name your plea may be sanctified.' 'By the honor of your lords, as well as ours, namely the blessed apostles Peter and Paul, our plea is sanctified. The estate of land and the church located there were under the right of the church of Tournai and the fee of Count Robert and at no time ever pertained to the church of Saint Médard.⁶⁶ Behold, I thus came and strove and now beseech on account of this that

61 The edition gives "Aldenborgh." The text is again in the present tense.

62 The forgery is described as *obliquas litteras*.

63 Müller, "Der Bericht," 105 n. 2, giving 1140 as the year.

64 Müller, "Der Bericht," 105 n. 3 notes Esther 14.13.

65 Müller, "Der Bericht," 106, noting, for example, Matt. 19.6.

66 From 1072–1092, noted by Müller, "Der Bericht," 106.

Your Serenity hear me and have compassion on me. The most holy Roman pontiffs, who took the way of martyrdom, established in their decrees that no one absent may be condemned.⁶⁷ And where was the sincere provision of the holy Roman Church when, against the decrees of the holy fathers you condemned me, though absent?" The pope replied 'We did not condemn you but, instead, freely and honorably received and heard you.' The abbot said 'Yet when you despoiled me of the church canonically given me without my having been called or heard, and then gave it to another without any examination, you did consider me damned.' The Lord Pope said 'If what was done concerning you was out of ignorance, then we utterly reject it and you reject it as well; we also pardon you and may you pardon us as well and, concerning the rest as we shall have found it proven, we shall gladly give you the justice of truth.'

The abbot said 'I give thanks to God and to you for kindnesses you have done and will do. Yet, I do not wish you to be ignorant that, coming from Flanders to Rome, I endured many things that were oppressive and difficult to bear and the excellence of your majesty frightens me. Truly, in all the nation of France there was no power or lordship that could compel me to come to Rome; yet the authority of your apostolic office, to which every man ought to be subject, drew me to come here.' The pope, amazed and on the verge of indignation, signaled with his right hand raised and said 'Brother, for the sake of God, what are you saying?' The chancellor, still sitting on the stool, said 'O Lord Abbot, see that you speak with care.' The abbot said 'Lord Father, because of your letter brought to me, which was not yours since it was a forgery, but was fortified by your seal, I was moved by a great zeal because of the injury to the holy Roman church and to your name as well, under which that letter had been sealed. For the letter was filled with every deception, falsehood, and lies, and thus I was scandalized and shocked, because it completely lacked any truth, and yet had the seal of the lord pope.'⁶⁸ Yet though I may confess this, still

67 'Ut nemo absens condempnetur.' Compare C 3 q. 9 c. 13. The reading of *condempnetur* for *iudicetur* is unusual. On decretist commentary concerning this text, see Schlinker, *Litis contestatio*, 111 and n. 171. The maxim had its origins in the civil law: Dig. 48.17.1pr. For an extensive treatment also considering some twelfth-century *ordines*, though neither Hariulf's story or the *ordines* in this study, Frank R. Herrmann and Brownlow M. Speer, "Facing the Accuser Ancient and Medieval Precursors of the Confrontation Clause," *Virginia Journal of International Law* 34 (1994): 481–552.

68 Such concern for authenticity and the importance of seals would grow increasingly important in the course of the twelfth century. Compare, for example, William of Longchamp's *Practica legum*, cap. 41 in chapter 4.

I impute no falsehood at all to the purity of Rome but, seriously, as I suffer disgrace,⁶⁹ (am shocked) that some person would be so impudent not to shrink from defiling your ears with such patent lies by deceiving you and hastening my destruction.'

To these words, the Lord Pope said 'Read this letter so that we may know whether you were rightly upset.' Then the abbot recited the letter:⁷⁰

Innocent, bishop, servant of the servants of God, to the beloved son Hariulf, abbot of Oudenbourg, greetings and apostolic benediction. It ought not be praised that you have raised altar against the altar⁷¹ and, departing from the duty of the faithful servant, have not increased the talent given you but, rather, have striven to bury it in the ground.⁷² Thus, since you were once a monk of Saint Médard's of Soissons and, departing from your monastic profession, with cunning intent made a cell in the priory commissioned to you and deprived the monastery of Saint Médard of both your obedience and her church, we thus command you, with staff put aside to the abbot of Saint Médard, swiftly to restore his own monk, rightly obeying him, and to restore as well to the chapter of the brothers of Saint Médard the church you took from them.

'Behold, this letter, clear as the light of day, is a great lie! For it was never so. I never was a monk of Saint Médard; neither did I ever receive a cell or a priory from the chapter or abbots of Saint Médard nor did I hold or possess from the monastery of Saint Médard the smallest sum of money. However, the greeting and blessing which ring out at the beginning of the letter I indeed loved and adored and cherished above gold and topaz,⁷³ since my anointed spirit greatly exulted.⁷⁴ But how was I able to endure such a monstrous reproach, such an unbearable injury, to see or learn that the holy ears of the supreme pontiff, thus infected by

69 'Ut nefas pacior.'

70 Innocent II (JL +8099).

71 Compare a letter of Augustine concerning the Donatists, Ep. 43: 2. 4, accessed at http://www.augustinus.it/latino/lettere/lettera_043_testo.htm on 5 April 2015. See also Joshua, 22.19.

72 Matt. 25.21–25.

73 As noted by Müller, "Der Bericht," 107 n. 3, a reference to Ps. 118.127: Ideo dilexi mandata tua super aurum et topazion.

74 Among various texts, Ps. 24.9, noted by Müller, "Der Bericht" 107 n. 4.

the hissing of lies, sent from the supreme height of Rome to the farthest regions of Flanders a letter I declare devoid of truth, filled with falsehood, resounding everywhere the opprobrium of the one who sent it?' (The pope replied) 'Indeed, brother, if you deny that you were a monk at such a time, it is fitting, as you say, that we believe you were received as abbot by your monastery.'

The abbot said 'Concerning the monastery, I completely inform and, with all friendship towards the holy Roman Church declare, that at the monastery of Saint-Riquier en Ponthieu,⁷⁵ it happened in the year of the Lord's Incarnation 1121, in the fourteenth indiction, that the Lord Peter, priest of Leo, came with you to visit and spent some thirteen days there.⁷⁶ Both you and your entourage were lavishly entertained, and this was where Abbot Anscerus also invited me to your attendance, since I had spent at that time some sixteen years in the care of the abbey. From that monastery I declare that during the time of the Lord Pope Paschal II I was called by both Baldric, bishop of Tournai and Lambert, his archdeacon, and absolved of my profession to his abbey by Abbot Anscerus and released from the church of Tournai. I then advanced to the order of abbacy canonically by the election of the brothers (already having taken place), since at that time there had been two abbots prior to me, Arnulf and Gervinus, in whose ordinations the church of Saint Médard had offered neither counsel nor aid, for nothing pertained to it.'

Then the pope asked 'Who was the founder or builder of your monastery?' The abbot responded 'O Lord, that place, with respect to its religious life, was founded by a servant of God by the name of Arnulf.' The pope said 'And who was that Arnulf?' The abbot replied 'He was the bishop of Soissons.' The pope said 'Before he became bishop, what sort of man was he?' The abbot said 'He had been a monk of Saint Médard. The pope said 'When you say that he was a monk of Saint Médard and the founder of your place, then equally it is fitting that you should confess that Saint Médard is the possessor of your monastery.' The abbot responded 'Not at all, O Lord, since the historical account runs differently. We implore you that it please you to hear us and permit us to recount the rest of the

75 Müller, "Der Bericht," 108 n. 1.

76 Müller, "Der Bericht," 108 n. 2, noting he was first Cardinal-priest Peter Pierleoni, then, later, the Anti-Pope Anacletus II and that Innocent II at that time was Cardinal-priest as well. On them, Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century. The Ecclesiology of Gratian's Decretum* (Berkeley and Los Angeles: University of California Press, 1972), 20.

matter, since otherwise you shall not discover the truth. The pope then said 'We willingly permit you to pursue the truth that we may perceive it from your narration.'⁷⁷

The abbot responded 'St. Arnulf, a man of God, from noble stock and even nobler character, left the soldier's life in this world and became a monk at Saint Médard.⁷⁸ Filled with both sanctity and virtue, he then retreated from the cloistered life to the hard life of a recluse whence, becoming abbot, he soon restored the entire monastery with an abundance of properties and rights. However, when called or, rather, ordered by King Philip to go forth with an armed force in an expedition against the king's enemies, he chose instead to seclude himself in his monastic cell. Then, as time passed, Gervaise, the servant of the king placed his own brother in the church of Soissons, without election by the clergy or people, the counsel of Rome or the church of Rheims.⁷⁹ His entry into the episcopacy, utterly uncanonical and his life of great indecency were made known in a letter to Pope Gregory VII. The pope did not delay in deposing Ursionis and then to call the man of God, Arnulf, who had been a recluse, into the episcopacy of the aforementioned church of Soissons.'⁸⁰ The pope said 'Behold, you have shown that holy Arnulf was the bishop, but not yet how he came to found your monastery.' The abbot said 'I am prepared to show it, if you are ready to hear it.' The pontiff said 'Continue.'

The abbot said 'Count Robert, forsaken by his own people and enraged by the rancor of his betrayal, accused certain noble clerics of plotting his death. The then expelled them from Flanders and, with their offices and honors stripped, compelled them to seek the mercy of the Roman church. Having compassion on their affliction, the Lord Pope sent the man of God, Arnulf, to Count Robert to see to the reconciliation of those clerics with him. When all had been peacefully settled, it then entered the mind of the count and certain other nobles, Everard of Tournai, his brother Cono, and Balduin of Ghent, to arrange a suitable dwelling for

77 The text reads *ut veritatem prosequaris, ita ut et nos de tua narratione senciamus noticiam veritatis*.

78 Renée Nip, "Life and Afterlife: Arnulf of Oudenburg, bishop of Soissons, and Godelieve of Gistel. Their Function as Intercessors in Medieval Flanders," in *The Invention of Saintliness*, ed. Anneke B. Mulder-Bakker (London and New York: Routledge, 2002), 59–60; see also "The Dispute," 277, arguing that Innocent eventually recognized that 'that there had been a mix up of two persons with very similar names' (Arnulf and Hariulf.)

79 The archbishop of Rheims was over Soissons.

80 Müller, "Der Bericht," 109 n. 6.

that man of God, Arnulf, by the church of Saint Peter the Apostle at Oudenburg. However, the man of God, upright and honest, completely refused that gift from the hand of the count.⁸¹ As a consequence, the bishop of Tournai at that time, Radbode, was called by the count, who took counsel with his clergy and, afterwards, ordered that he would not hand over the church under his right to any other unless under the condition that, at the very least, an abbey of monks, not a cell, immediately would be built in the same location. He was indeed now taking care that, on account of Saint Arnulf, former monk of Saint Médard, no one would raise any complaints.

When these statements had been heard, the abbot was briefly silent then, resuming his narration, said to the Lord Pope 'Behold, most reverend Father, our place was founded by such a lord and has been found never to have belonged at any time up to now to Saint Médard or the abbots of Saint Médard. Indeed, that abbot of Soissons had no just right at all but, rather, incited by scheming clerics, rashly presumed this. For they were saying to him 'Why are you waiting? Why are you afraid? An abbot who dies before you may not contradict you. Only complain and you will receive it all. There is neither force nor might to resist you. Act manfully and you shall see their hearts struck by great panic.' Inflamed by such suggestions, the lord abbot of Saint Médard, hoping for the impoverishment of our properties and resources and his own victory, availed himself of the arms of mendacity,⁸² and did not fear to deceive the supreme pontiff, nor to do this, provided he was enriched and gain a property not his own and a name for himself, what no one had done before. That you may understand the matter more accurately, I beseech you to order that the testament of the bishop of Tournai and, likewise, what was decreed by Arnulf himself, be read before you from the beginning.'⁸³

Then two documents from bishops Radbode and Arnulf were read. After they were recited and carefully considered, the abbot then said to the pope: 'Behold, O Lord, your eyes see and your ears hear,⁸⁴ and the lord cardinals clearly understand that such writings recited here attribute

81 Again avoiding the taint of simony.

82 Müller, "Der Bericht," 110 n. 2, comparing, for example, Rom. 13.12.

83 Müller, "Der Bericht," 110 n. 3 notes older scholarship questioning the charter's authenticity and believes, however, there is no evidence that Hariulf was guilty of forgery. For a dissenting view, Nip, "The Dispute," 278–79, that the first charter was a pious forgery and that Hariulf also failed to inform the pope of all the facts in the case.

84 Compare Mk. 8.18.

nothing at all to Saint Médard or its abbots.' The pope said 'Truly, nothing.' Then the bishops present there, along with the chancellor Haimeric, said 'Such documents very much prevent the abbot of Saint Médard from saying anything further against this argument. 'Then the abbot, greatly rejoicing, adored the pope and the gathering, and then said 'O Lords, after the apostles, it has been written about you 'Their principality was greatly strengthened.'⁸⁵ For that reason, the letter so frightened me that my spirit could not be quieted in any way unless I myself, such an insignificant person, came to you and in your presence explained both the false arguments and what was true. Indeed, in all the land I did not know anyone before whom I could explain my case, save the Roman pontiff, vicar of Christ, successor of Peter and patron of all the churches. For, considering my ignorance, if I had not come this court, the one desiring our place would have possibly deceitfully labeled me as contumacious and then would have labored to have the chain of excommunication cast upon me.'⁸⁶

Then the Lord Pope said 'Behold, though you labored beyond your strength, though you spent properties against your monastic vow,⁸⁷ you did much well, because you sought the Roman church. Thus, you shall have Our grace and your case will prosper since, not by wandering about but,⁸⁸ instead, by wisely proceeding you made clear to Us with reason the truth and showed no ambiguity in your words.' The abbot said 'Honored Father, since indeed your mercy towards me is great,⁸⁹ I desire you to confirm to me the same freedom in which I was ordained, and also to my successors so that our place, unjustly oppressed, now fortified by your privilege may no longer be weak.' The pope said 'There are two things that stand to Us and you, that the church committed to you is being oppressed by this present calumny and the request of your bishop not being held. However, we willing assent to the liberty of both yourself and

85 Ps. 138.17.

86 We saw in chapter 1 that Ivo of Chartres was concerned about this as well. That there was a 'good deal of contumacy' in evidence from contemporary Lucca, Wickham, *Courts and Conflict*, 100, noting that it actually increased to 'over 40 per cent' by the 1190s. Granted, Hariulf was worried about the charge in the ecclesiastical court; at the same time, that individuals ignoring charges and avoiding the secular court was so common, at least in Lucca, is remarkable.

87 Perhaps this refers to the abbot using the resources of his monastery to travel to Rome.

88 This might be an allusion to the *gyrovagantes*, monks who, instead of remaining in the monastery 'wandered about' without following a rule. This was condemned by the *Benedictine Rule*.

89 Ps. 85.13.

your place, and it is necessary that we thus settle your case, so that may enjoy our peace and the oppressive adversary may rightly find no place for complaint. Thus it is necessary that, with you now removed from the room, we enter into counsel with our fathers and set in order both your peace and our defense. As we have great compassion for you, we shall take care of this promptly.'

With these things thus declared, the meeting was adjourned. On the following day, the lord pope ordered the abbot be summoned and the chancellor to declare to him the counsel they had found. The chancellor said to the abbot 'Lord Brother, our Apostolic Lord, along with the entire curia, is greatly concerned for you and your case. If you wish to agree, it is so ordained that, with your condition preserved in all respects, three religious persons from the land of the French be elected to whom the lord pope may enjoin your business, so that if your adversary should not wish to be silent, he may declare before those people and they themselves may judge among themselves and their judgment be valid and beyond reproach. We have considered that this be so done for the sake of your convenience, and we especially take care that you do not have to return to Rome. For the Lord Pope, together with his entire curia, greatly inclines towards you, since you please us all with both your demeanor and words. Because you sit by the feet of our lord, there is deference of honor, and the right of selecting persons placed in your judgment.'

Casting down his face, the abbot responded 'For all these things, I am grateful, yet I rather desire and wish that the lord pope or his curia would do this election, so that our adversaries would not object.' The pope said 'Who are your adversaries?' The abbot replied 'The Bishop of Châlons-sur-Marne and the Bishop of Arras.'⁹⁰ Smiling, the pope said 'We have full faith in those men and are confident in their truth and religion that they shall never do anything unjust to you.' The abbot said 'Though they are good, nevertheless they are suspect to me:⁹¹ the bishop of Châlons-sur-Marne since he was the abbot of Saint Médard; the bishop of Arras, for he was

90 Müller, "Der Bericht," 112 n. 1, 2 gives information about each, noting that Gaufridus, Bishop of Châlons-sur-Marne (1131–1142) had been abbot of St. Médard of Soissons from 1120–1131.

91 See Haye, *Lateinische Oralität*, 89 on these bishops and the dispute. On concern for suspect judges, see chapter 5 below for the *Ordo Bambergensis*, cap. xvii, and Harald Müller, *Päpstliche Delegationsgerichtsbarkeit in der Normandie (12. und frühes 13. Jahrhundert*, 2 vols. (Bonn: Bouvier Verlag, 1997), 1.202–03 on the give-and-take here between the abbot and pope as evidence of how the judge's qualifications were understood.

the one who stirred up all this trouble. And, as Jerome says, ‘What is the need to leave what is certain to chase after what is uncertain?’⁹² France has other men whose grace I do not fear, a grace not inferior to theirs.’ The pope said ‘If you reject these, whom do you accept?’ (The abbot replied) ‘If permitted, I accept the bishops of Térouanne, Chartres, Laon, and Soissons.’⁹³ The chancellor said ‘The bishop of Chartres will not be given you, for he is a long way from you and has also been greatly involved in the affairs of Rome, nor will you have the bishop of Laon, since it legally obtains that no case may be imposed on him save his own.’⁹⁴ We also do not grant the bishop of Soissons, lest we be said to have sown discord or a dispute between him and the abbot of Saint Médard. Provide for good men who shall judge without any deception, bishops or abbots, and let no suspicion from either side be imputed to them, and let them be the judges of this matter.’ The abbot quickly said ‘I willingly accept the lord abbot of Clairvaux, the abbot of Saint Remigius of Rheims, and the abbot of Cîteaux.’⁹⁵ The chancellor said ‘The Lord Pope does not permit the abbot of Clairvaux to be bothered, since he is ill, nor the abbot of Cîteaux, for he is far away.’⁹⁶ The abbot of Saint Remigius is nearby, but one might become angry with him if he supported you; if he orders another, he might be said to have done this on account of an abundance of favorites. May it be so: accept the bishops of Térouanne and Arras and the abbot of Prémontré.’ (The abbot replied) ‘Two I commend; if possible, I recuse the third, namely the bishop of Arras.’⁹⁷ The pope said ‘Why do you fear that man, since we feel he is both religious and of sound counsel?’ The abbot said ‘I do fear him since he is steadfast in his zeal and the instigation of this, my labor, is attributed to him.’ The pope said ‘Permit him and we shall promise that no harm shall come to you. Returning with peace

92 Jerome, *Contra Vigilantium*, c. 16 (PL 23.252A): *Quid necesse est certa dimittere, et incerta sectari?*

93 For further information these, Müller, “Der Bericht,” 112 nn. 4–6.

94 The source is uncertain, though this would suggest awareness that a bishop could not judge outside his jurisdiction.

95 For further information, Müller, “Der Bericht,” 113 nn. 1, 2.

96 On this passage, Harald Müller, “Entscheidung auf Nachfrage: Die delegierten Richter als Verbindungsglieder zwischen Kurie und Region sowie als Gradmesser päpstlicher Autorität,” in *Römisches Zentrum und Kirchliche Peripherie. Das universale Papsttum als Bezugspunkt der Kirchen von den Reformpäpsten bis zu Innocenz III*, ed. Jochen Johrendt and Harald Müller (Berlin and New York: De Gruyter, 2008), 120–21 and n. 30, discussing why these men were rejected. See also Robinson, *The Papacy*, 193.

97 Müller, “Der Bericht,” 113 n. 3: Hugh 1 (1128–1161).

to Flanders, since the way is passable, you will visit him and greet him for me. Also add this from me 'O Lord, the Roman pontiff declares to you under this trust which he has for you that you shall not in any way injure me.' Then the abbot said to the pope 'O Lord father, and pastor of the whole world, seeing that it thus pleases you, though I admit that that man will greatly harm me because of this, you should know that like a devoted son I obey you.' The pope said 'You speak rightly and act even more so, and we completely support you.'

Afterwards, it was done just as was said, and the pope ordered the chancellor to write a letter to be given to the abbot and, turning his face to the cardinals, he said with a clear voice 'By my faith, that man is great of heart.' The cardinals said 'Truly he argued his case honestly, resolutely, and courteously.' The abbot said 'If you feel that I am a man of good heart, you should this for me without hesitation.' The pope said 'We shall truly do it for you and, preserving the cause of justice, we should prevail.'

Another day, when the abbot had come before the Lord Pope, the latter, smiling, said to him 'What now brother? Did you see the letter written for you?' The abbot responded 'O Lord, I did not see it.' The pope replied 'It is with the chancellor. If you wish, go and see, and then tell us if it pleases you.' The abbot went, saw, read the letter, and then returned and said 'It would please me, if the Bishop of Arras had been removed. For that fear that once me gripped me has never left my breast.' The pope said 'With Our consent, the election of two was given you; it is no less fitting that We have the selection of one.' The abbot said 'The election of one and all belongs to your judgment.' The pope said 'You speak well, but with paternal affection we entreat and advise you since, indeed, you are a very old man,⁹⁸ that you not lose your soul for such a reason. However, if some justice of truth is known to you that it ought to be the abbot of Saint Médard, confess it to us, whether openly or secretly, and we shall make a good pact of concord for you with that abbot nor shall we for any reason allow your gray hairs to be treated dishonestly.' Then, rising, the abbot stood and said 'O Lord Father and pastor of the whole world hear, I beseech you, and hearken to me: truly through the solid faith on which Peter was established, when he said 'You are Christ, the Son of the living God,'⁹⁹ I in such a cause never knew or claimed the justice of the church of Saint Médard. Since I know that the blessed Médard is the precious confessor of the Lord, why would I diminish or deny his things, for I know

98 Literally 'about to die.'

99 Matt. 16.16.

that this would bring damnation on me? Far be it from me, far be it from any Christian, to think I would be seized with such madness.' The chancellor said to the pope 'Truly, O Lord, though he did not consider beforehand, he satisfied most correctly both you and your entire curia. On account of this, we judge that his case should be considered true and just since, not in a careful, staged fashion,¹⁰⁰ but eloquently before you and your curia he arranged the arguments of his case and did not offend with any deceptive word. Instead, his every word followed the straight path.' The pope said 'May he be blessed by God and us.'

The abbot said to the Lord Pope: 'As I am about to go back, I ask that you deign to hear the confession of my crimes so that, having come as a sinner, I may depart, cleansed by your absolution.' The chancellor said 'By my faith, he asks for a just thing.' The pope added 'We do this willingly.' The abbot said 'If you do this, do not delay.' The pope replied 'Let it be done. Follow me.' Rising immediately, he retired into the most secret place; following him, the abbot made his confession and received absolution and benediction. He then desired to leave. Pausing, however, the pope said 'Brother, I wish and ask that you greet our dearest brothers for me and cheer them concerning our well-being.' The abbot said 'Oh how willingly, if I knew who they were and if the way to them would be passable for me.' The pope replied 'I do not ask you to desert your path but, if perhaps they came to you during the course of the year, you might remember my petition.' The abbot said, 'If it pleases, tell me who they are.' The pope said:¹⁰¹ 'The bishops of Langres, Auxerre, Chartres, Châlons, Arras, Têrouanne, Soissons, and Laon.' The abbot said 'Why are you overlooking the bishop of Noyons, since his noble life is even more useful than the rest?' The pope replied 'I do not overlook him, but enjoin friendly greetings to him.' The abbot replied 'You see to the bishops, do you entirely despise the abbots?' The pope said 'I earnestly desire to greet both abbots and all religious in the Lord, especially the abbot of Clairvaux and those like him.' The abbot said 'The abbot of Saint Remigius greatly deserves your greetings since, as much as he has been able, he has improved that place.' The pope eagerly said 'Greet that man reverently, since he has labored well in the house of the Lord. I particularly ask that you greet with all solicitude that venerable brother, Our friend, Abbot Hugh of Prémontré and convey to him in Our stead Our great thanks for his services.' The abbot said 'O Lord, if it

100 The *ordines* will consider the possibility of premeditated answers by witnesses, a sign that their testimony might not be valid.

101 Again, Müller, "Der Bericht," 115 nn. 1–2 provides further information.

pleases you, he shall be greeted diligently by me in Your stead, and then it shall be fitting for me to return through his place and, ordered by Your paternal command, to greet him in person.' The pope said 'You do very well indeed and you could do nothing more gracious for me.' The abbot replied 'Perhaps he will doubt that your Holiness appointed me to do such a thing unless I shall be able to offer some evident sign proceeding from Your mouth.' The pope said 'We relate with many thanks the book of St. Augustine concerning the *City of God*, beautifully written, bound, and decorated which he sent to Us.¹⁰² We also request that among them there be neither priest nor lord but, rather, earnestly desire that the brothers be, and remain, one. Nevertheless, if we are able to help them in some way from Our office, We shall be found diligent and swift in this regard. Concerning the rest, we desire and beseech that they pray for Us and for the Roman church. Peace be with you!'

Hariulf gives us a glimpse into how legal procedure unfolded at the curia during Haimeric's tenure as papal chancellor. Despite the likelihood that some written models shaped the dialogue, it still retains a fundamentally oral character.¹⁰³ It is as good a record of an *audientia episcopalis* from the period as one could probably find.¹⁰⁴ While the exact exchange between the parties obviously has not survived, there seems little reason to doubt the report's fundamental accuracy.¹⁰⁵ Throughout, the chancellor advises and mediates. Perhaps Hariulf even viewed Haimeric as a judge subordinate only to the pope himself.¹⁰⁶ Elaborate expressions of deference and esteem contrast with sharp accusations, at least by the abbot, of how his enemies have behaved. No less striking are Hariulf's occasional, almost impertinent, challenges to the pope himself. How the abbot eventually instructed Innocent in the facts, at least from his point of view, of the case, and its apparent misrepresentation reveals rhetorical and negotiating skill. Innocent's own frustration, despite his periodic expressions of paternal affection, equally demonstrate how difficult

102 Müller, "Der Bericht," 115 n. 3, noting this manuscript no longer exists.

103 Haye, *Lateinische Oralität*, 93–94, noting *cursus*, rhyming prose. On legal narrative, see also Wickham, *Courts and Conflict*, 14–15, commenting on their 'fictive' quality as well as the very real consequences they confronted. He reminds us that 'Law courts had teeth.' Hariulf undoubtedly knew this.

104 Robinson, *The Papacy*, 189. Also, compare a similar text from the 1180s, on which see Winroth, "The Teaching of Law," 48–49.

105 Haye, *Lateinische Oralität*, 94.

106 As suggested by Robinson, *The Papacy*, 96.

it was for the curia to exercise its function as the ultimate appellate court of the church.¹⁰⁷ The ancient canons and decretals declaring Rome's unique legal position, texts that had been studied with increasing interest for the previous century, ran against the realities of ecclesiastical politics, as witnessed by the give and take between pope and abbot, concerning who would ultimately judge the case and how.

Hariulf's letter is rich in detail. For example, it gives us a good sense of the difficulties of travel in order to pursue or defend a claim. It is somewhat reminiscent of the contemporary, English Anstey Case.¹⁰⁸ On the learned law, however, it is silent. There are no echoes of the civil-law 'big bang.' Instead, we encounter scattered references to the Bible, something largely, if not entirely, absent in the *ordines* to be considered later in this volume.¹⁰⁹ There is not even an isolated legal term to suggest familiarity with the civil law; *contumacia* and *calumnia*—as discussed above—were commonly known and did not necessarily possess any technical meaning. In sum, Hariulf's report demonstrates how informal,¹¹⁰ and unsophisticated (by civilian standards), the papal court was at midcentury. This makes the curia of Alexander III, less than twenty years in the future, even more remarkable.¹¹¹ Hariulf describes, by and large,

107 Haye, *Lateinische Oralität*, 91. Innocent was aware of the need for greater legal sophistication. On Innocent and legal procedure, Fried, "Die römische Kurie," 168, noting that he was the first pope to grant the judges of the city of Rome an annual salary and also admonished them to treat their clients 'according to the constitutions, laws, and good customs.'

108 See below. Among many studies, Paul Brand, "The Origins of the English Legal Profession," *Law and History Review* 5.1 (1987): 31–50.

109 Compare the *Practica legum* of William of Longchamp in chapter 4.

110 See Robinson, *The Papacy*, 190, though also noting that the delegation of the case to Haimeric indicated growing 'specialization' in procedure.

111 Helmholz, *The Canon Law*, 96. Alexander, pope from 1159–1181, was a major figure in the ecclesiastical and secular politics of his day. He had to deal both with the opposition of the German emperor, Frederick Barbarossa and also the conflict between Thomas Becket and Henry II in England, the latter the turbulent context in which the *De edendo* was composed and later works, the *Practica legum* and *Ordo Bambergensis*, were also read. His many decretals not only reflect his engagement with these high-profile political challenges but also the growing papal supervision and control of the Church's organization and discipline; they witness the extension of the papal *ius novum* throughout the west. For a recent study of Alexander's reign, and a gateway into the vast literature on his pontificate, Pope Alexander III (1159–1181). *The Art of Survival*, ed. Peter Clarke and Anne Duggan (Aldershot: Ashgate, 2013).

how evidence preparatory to trial was evaluated. It was more ritual than *ordo*, at least *ordo* as understood by Bulgarus and the *ordines* to come.¹¹²

The story of the married couple wrongly seized as serfs by a 'fierce adversary' is remarkable.¹¹³ Hariulf is telling a parable to illustrate his case. It speaks to the illegal claims made by Soissons to Oudenberg and the threat to his own position. Such argumentation rarely appears in the technical, elaborate, *ordines*. While examples will abound to illustrate procedural issues such as exceptions, we will seldom encounter argument from parable or analogy.¹¹⁴

There is no sign of any professional advocates in Hariulf's account. In the give and take between abbot and pope, with Haimeric attempting to mediate, we hear names of potential judges, not texts or points of legal procedure. As Paul Brand noted some years ago in his study of the Anstey Case when, about a decade after Hariulf's trip to Rome, an English nobleman undertook a lengthy, and expensive, suit to acquire a disputed inheritance, what mattered

112 Compare here Geoffrey Koziol, "Baldwin VII of Flanders and the Toll of Saint-Vaast (1111): Judgment as Ritual," in *Conflict in Medieval Europe*, 159, 161.

113 On the historical background against which contemporaries might have understood the parable: Galbert of Bruges, *The Murder of Charles the Good. Count of Flanders. A Contemporary Record of Revolutionary Change in 12th Century Flanders*, tr. and ed. James Bruce Ross (New York: Columbia University Press, 1959), 99–100 and n. 14. The evidence comes from the supposedly servile origins of the Erembalds, who would plot to murder the count. For his part, Haimeric might have reflected on the Roman law. The contrast is not exact, but see Nov. 22.11 (*Authenticum* 4.1), which declares, among other things, that if a master knew of a servant's marriage to a free person, she was free, even he had not 'given her away.' This *authenticum* is discussed by Kenneth Pennington, "The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The *Authenticae*," *Rivista Internazionale di Diritto Comune* 22 (2011): 43. See also Lucca Loschiavo, "La Riforma gregoriana et la riemersione dell'Authenticum. Un 'ipotesi in cerca di conferma,'" in *Proceedings Esztergom*, 159–70 and, generally, *Nouvellae Constitutiones. L'ultima legislazione di giustiniano tra oriente e occidente da triboniano a Savigny*, ed. L. Loschiavo, et al. (Naples and Rome: Edizioni Scientifiche Italiane, 2011). On the relevant canon law, for example compensation concerning a serf, James Brundage, *Law, Sex, and Christian Society in Medieval Europe*, (Chicago and London: University of Chicago Press, 1990), 196, 360–61. See also, generally, Antonina Sahaydachny Bocarius, "The Marriage of Unfree Persons: Twelfth Century Decretals and Letters," in *De iure canonico medii aevi. Festschrift für Rudolf Weigand*, ed. Peter Landau and Martin Petzolt (Rome: LAS, 1996), 481–506.

114 An exception, however, will be the *Ordo Bambergensis* (chapter 5 below) which, like the case here, uses marriage for analogies. That analogy played an important role in the development of legal reasoning is discussed by Harald Siems, "Adsimilare. Die Analogie als Wegbereiterin zur mittelalterlichen Rechtswissenschaft," in *Europa an der Wende vom 11. zum 12. Jahrhundert. Beiträge zu Ehren von Werner Goetz*, ed. Klaus Herbers (Stuttgart: Steiner, 2001), 148–49.

most was influential friends, not 'expert, professional legal advice.'¹¹⁵ Granted, he was commenting on the royal, not ecclesiastical courts, the latter employing learned legal advice.¹¹⁶ Nevertheless, Hariulf's negotiations with the pope reveal that the ecclesiastical court could be equally susceptible to patronage and pressure. Having the right advisors, best of all, a judge, himself positioned in his even more favorable web of "friends," was most desirable. Even with the increasing employment of the learned law, civilian, canonical, or common, in the decades after Hariulf and Richard of Anstey, we should not forget that these connections, with formal and informal power, never faded away.

The *ordines* in coming chapters, however, will still echo some aspects of Hariulf's report. The problem of conflicting or false testimony will concern, for example, the *Practica legum* of William of Longchamp. Forgeries worried jurists later in the twelfth century no less than Hariulf and his contemporaries. The necessity of confronting the accuser, and the threat of condemnation due to contumacious absence, something that we have already seen troubled Ivo of Chartres, will appear in our treatises. Likewise, the contentious selection of judges must reveal something of how the judges-delegate were selected, again a subject of considerable concern in the *ordines*.¹¹⁷

Bulgarus' Letter to Haimeric

We now turn to Bulgarus' letter to Haimeric. Possibly Innerius' student at Bologna, Bulgarus' fame (at Bologna he earned the nickname of the 'Golden Mouth') was widespread throughout the twelfth century.¹¹⁸ He greatly

¹¹⁵ Brand, "The Origins of the English Legal Profession," 33–34.

¹¹⁶ I thank Dr. Hudson for pointing this out.

¹¹⁷ Fundamental is Jane Sayers, *Papal Judges Delegate in the Province of Canterbury 1198–1254. A Study in Ecclesiastical Jurisdiction and Administration* (Oxford: Oxford University Press, 1997). See also Helmholz, *The Canon Law*, 97–98 and Robert Figueira, *The Canon Law of Medieval Legations*, (PhD. Thesis: Cornell 1980).

¹¹⁸ Long considered one of the first teachers of law at Bologna. See Stein, *Roman Law*, 47, also Coing, *Handbuch*, 154–62 and Cortese, "Theologie," 67–70, also placing him and Pepo in the theological 'atmosphere' of the Gregorian reform. For recent discussion of Innerius' possible role in the additions of *authenticae* to manuscripts of the *Codex*, Pennington, "The *Authenticae*," 37, admitting that a definitive answer is probably not possible. On Bulgarus as Innerius' student at Bologna, Brundage, *Medieval Origins*, 81–82 also, in general, Kantorowicz, *Studies*, chapter iii, Fried, "Die römische Kurie," 167–68, and Witt, *Two Latin Cultures*, 243–44.

influenced both civilians and canonists.¹¹⁹ His view of the civil law was that it was essentially equitable. The jurist was to interpret the legal rule in context and, if necessary, explain its purpose by finding similar texts.¹²⁰

The surviving manuscripts of Bulgarus' letter to Haimeric indicate his influence.¹²¹ In length, complexity and command of the civil law, it could not be more different from Hariulf's account of litigation at the curia.¹²² Exactly why Haimeric had written Bulgarus will, of course, probably never be known.¹²³ Perhaps he was responding to a request that certain terms and practices

-
- 119 Brundage, *Medieval Origins*, 86 and n. 49, noting the adaptation in Gratian's *Decretum* of a passage from Bulgarus' *De iuris et facti ignorantia*. See also Franck Roumy, "L'ignorance du droit dans la doctrine civiliste des xii^e–xiii^e siècles," *Cahiers de recherches médiévales et humanistes*, 7 (2000), accessed on 21 January 2014 at <http://crm.revues.org/878> On Bulgarus and the decretists, see the canonistic treatise *Secundum leges* from the second half of the twelfth century discussed by Litewski, *Zivilprozeß*, 22 n. 109, also 76 n. 354; see also Rudolf Weigand, "The Transmontane Decretists," in *The History of Medieval Canon Law*, 183, 196 noting, respectively, the use of Bulgarus by the *Summa* 'Elegantius in iure divino' (*Summa Coloniensis*) and *Summa Lipsiensis*. The latter is probably a source for the *Ordo Bambergensis*, on which see chapter 5 below.
- 120 For an opposite view, see his contemporary, Martinus, who believed that equity permitted a much broader interpretation, where even legal texts seemingly not related to the topic at hand could be considered. See also Stein, *Roman Law*, 47–48. For an example of a judgement by Bulgarus in 1159, Wickham, *Courts and Conflict*, 158.
- 121 Fowler-Magerl, *Ordo iudiciorum*, 35–37, 40, Brundage, *The Medieval Origins*, 86, Kantorowicz, *Studies*, 68–70, Lange and Kriechbaum, *Römisches Recht im Mittelalter*, 162–70, and Fried, "Die römische Kurie," 153–54.
- 122 *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, 5 vols., ed. Ludwig Wahrmund (Innsbruck: Wagner, 1905) 4.1. First part, as transmitted in France, was also edited by A. Wunderlich, *Anecdota quae processum civilem spectant* (Göttingen: Vandenhoeck and Ruprecht, 1841), 1–26. On manuscripts and the editions by Wahrmund (the entire treatise) and Wunderlich (only the first part,) Fowler-Magerl, *Ordo iudiciorum*, 35–36, also noting that research by Gero Dolezaleck shows that the letter's sections 9–15 'nur Teile einer selbständigen Kleinschrift sind, die mit *Cum secundum diversitatem actionis* beginnt.' For additional manuscripts, including partial transmissions, Gunnar Teske, "Ein neuer Text des Bulgarus-Briefes an den römischen Kanzler Haimeric. Zugleich ein Beitrag zum Verhältnis von Saint-Victor in Paris zur Kurie," in *Vinculum Societatis. Joachim Wollasch zum 60. Geburtstag*, ed. Franz Neiske, et al. (Sigmaringen: Glock and Lutz, 1991), 302–13, focussing on a twelfth-century copy from Saint Victor in Paris, and 308–13, calling attention to the chancellor's possible connections with the monastery.
- 123 In general, Fowler-Magerl, *Ordo iudiciorum*, 35–40. On Haimeric's career and legal knowledge, Fried, "Die römische Kurie," 166–67.

be explained.¹²⁴ The affectionate address, *karissimo*, may also mislead, for it was common enough in contemporary letters to suggest convention.¹²⁵ While it is possible, indeed likely, that the two knew one another either from Bologna or through mutual association with Pope Honorius,¹²⁶ there is simply not enough reliable information to determine how close their relationship was.¹²⁷

Scholars have emphasized that the letter's spirit and content, but not its form, anticipated the *ordines*. The *ordines* will not be letters.¹²⁸ Bulgarus does not treat many of the topics we shall encounter in later chapters.¹²⁹ Nevertheless, there remain numerous points of comparison between the letter and the treatises to come, from the respective roles of plaintiff, defendant, and judge to the forms of appeal.

Bulgarus' sources are confined entirely to the civil law.¹³⁰ In this respect, his letter most resembles the *De edendo*, which we shall discuss in chapter three. Indeed, given his detailed treatment of such technicalities as procedure in the long-vanished imperial provinces of Egypt and Libya, one wonders about the degree to which his letter was understood, let alone applied, at the curia described by Hariulf.¹³¹ If Haimeric asked the famous jurist for answers

124 Knut Wolfgang Nörr, "Zum institutionellen Rahmen der gelehrten Rechte im 12. Jahrhundert," in *Aspekte europäischer Rechtsgeschichte. Festgabe für Helmut Coing zum 70. Geburtstag*, ed. C. Bergfeld et al. (Frankfurt am Main: V. Klostermann, 1982), 240.

125 For example, *Die Tegernseer Briefsammlung des 12. Jahrhunderts* ed. Helmut Plechl and Werner Bergmann (Hannover: Hahnsche Buchhandlung, 2002), with fifteen examples.

126 Discussing scholarship and evidence for this, Pennington, "Roman Law," 248–49, arguing also that Haimeric must have become friends with Bulgarus through some contact with Bologna. See also Brundage, *Medieval Origins*, 86 and, for the papacy's connections with Pisa during the 1130s and legal studies there, Ascheri, *The Laws*, 118.

127 On Bulgarus and early Italian *ordines*, Litewski, *Zivilprozeß*, 22.

128 Weimar, "Die legistische Literatur," 146, discussing the influence of *dictamen* in the letter. For its similarities to the *Streitschriften* of the Investiture Contest and an argument that similar political concerns lay behind them, Fried, "Die römische Kurie," 164.

129 Fowler-Magerl, *Ordines*, 37–40, also Peter Landau, "Die Anfänge der Prozesswissenschaft in der Kanonistik des 12. Jahrhunderts," in *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, vol. 1: *Zivil- und Zivilprozessrecht*, ed. Orazio Condorelli, et al. (Cologne, Weimar, Vienna: Böhlau Verlag, 2009), 12, arguing the letter was not the 'initial spark' for Bolognese teaching of civil-law procedure.

130 Litewski, *Zivilprozeß*, 38.

131 Perhaps it was never intended for actual use but, instead, study to master 'a body of esoteric knowledge' in order to enter the legal profession. On this, James A. Brundage, "The Rise of Professional Canonists and the Development of the *Ius Commune*," *ZRG KA* 81 (1995): 26–63, rp. in his *Profession and Practice of Medieval Canon Law* (Farnham: Variorum, 2004), cap. i, also Hoefflich and Grabher, "Normative Legal Texts," 2.

to a series of questions, he may have received more civil law than he could possibly use.¹³²

Some of the letter's main points should be briefly summarized. Bulgarus begins by identifying the necessary participants in a trial. His understanding that three were essential, plaintiff, defendant, and judge, would become the dominant view, though not without variation, in civilian and canonistic *ordines*.¹³³ He then goes through virtually every step in the legal process.¹³⁴ Among many topics, he considers at some length the difference between arbiters and judges in a passage which Pope Innocent II and Gratian may have known;¹³⁵ he then treats the duties of the advocate, including his possible abuse of power. He discusses other procedural questions such as the nature of a valid legal decision, burden of proof, exceptions by both defendant and plaintiff, and who could be a valid witness.¹³⁶ All of these are treated in the later *ordines*, and at greater length.¹³⁷

Bulgarus also treats the *regulae iuris*, legal rules and maxims. These were found at the end of the *Digest* in book 50.¹³⁸ Likewise, they conclude his letter to Haimeric. While other jurists in the twelfth century would comment on Dig. 50¹³⁹ our *ordines* do not. None has a section dedicated to the *regulae iuris* and, in fact, we shall only hear occasional echoes of them.

132 On the undoubtedly confusing aspects of the Roman law, whose political and social assumptions were often very foreign to the early twelfth century, Laurent Mayali, "The Development of Law in Classical and Early Medieval Europe: Foreword: Social Practices, Legal Narrative, and the Development of the Legal Tradition," 70 *Chicago-Kent Law Rev.* (1995): 1472.

133 Among many studies, Litewski, *Zivilprozeß*, 51.

134 Litewski, *Zivilprozeß*, 52.

135 Arguing this point, as well as discussing Gratian's knowledge of Bulgarus' *De iuris et facti ignorantia*, Pennington, "Practical Use," 21–24.

136 Yves Mausen, *Veritatis adiutor. La procédure du témoignage dans le droit savant et la pratique française (xii^e–xiv^e siècles)* (Milan: A. Giuffrè, 2006), 61, comparing also later *ordines*, including the *Ordo Bambergensis*.

137 His comment that the burden of proof is not affected by whether a property is moveable or immoveable is, however, not found in the other *ordines* we shall examine.

138 Hyams, "Due Process," 86–90 and, in general, Peter Stein, *Regulae Iuris: From Legal Rules to Legal Maxims*, (Edinburgh: University Press, 1966).

139 Weimar, "Die legistische Literatur," 216. On Bulgarus' treatment of the *regulae* as an anticipation of later *quaestiones legitimaes* and *brocardia*, André Gouron, "La diffusion des premiers recueils de questions disputées: des civilistes aux canonistes," in *Studia in honorem eminentissimi Cardinalis Alphonsi M. Stickler*, ed. Lara Castillo, et al. (Rome: LAS, 1992), 168, rp. in his *Juristes et droits savants*, cap. iv and, in a subsequent study found in the same volume of collected essays (cap. vi), "Observations sur le *Stemma Bulgaricum*,"

Bulgarus begins by noting that law produces the rule. Neither realist nor nominalist in the medieval sense, nor conceiving of law like a modern ‘formalist’ or ‘sceptic,’¹⁴⁰ Bulgarus believes that rules are based on legal precedents. They are also practical, as they concern, in condensed fashion, the matter at hand. This view was firmly rooted in the civil law he knew so well, which recognized that rules proceeded from multiple legal sources.¹⁴¹ Rules emerged from the mass of legal tradition. Not without reason do we find the *regulae* in the last book of the *Digest* and at the conclusion of Bulgarus’ letter.

The later *ordines* will treat some of the themes Bulgarus discusses in the *regulae*, though they cite texts other than those in Dig. 50. The *De edendo*, for example, will consider oaths when treating rules on proof.¹⁴² However, Bulgarus reflects more deeply on the subject, as seen in the syllogism he uses when discussing *nullius res sacrae et religiosae et sanctae*, a maxim in the classical law declaring that sacred objects cannot be someone’s property.¹⁴³ Such logical analysis of major and minor premises, in this instance property and inheritance, does not appear in the *ordines* we shall later examine.

Bulgarus’ concern with the transfer of property goes beyond such exercises in dialectic. While consideration of property is hardly surprising in any

in *Cristianità ed europa. Miscellanea di studi in onore di Luigi Prosdocimi*, ed. Cesare Alzati (Rome, Freiburg, Vienna: Herder, 1994), 485–95. Bulgarus’ major commentary on the *regulae* is edited as *Bulgarii ad Digestorum titulum de diversis regulis iuris antiqui commentarius*, ed. F.G.C. Beckhaus (Bonn, 1856, rp. Frankfurt: Minerva, 1967). Discussing later canonistic *quaestiones*, Kenneth Pennington and Wolfgang Müller, “The Decretists: The Italian School,” in *The History of Medieval Canon Law*, 121–73 at 104–05 and n. 205 with reference to numerous studies by André Gouron, including the one noted above.

140 For the common law, H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), chapter 7.

141 On the multiple sources of Roman law, James Bernard Murphy, *The Philosophy of Positive Law. Foundations of Jurisprudence* (New Haven and London: Yale University Press, 2005), 3. Granted, there was the exceptional *Lex regia*, where the prince was declared the source of law: Dig. 1.4.1pr. Ulpianus 1 inst. Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat. The commentary on this text is vast. Among many studies, Brian Tierney, “The Prince is Not Bound by the Laws. Accursius and the Origins of the Modern State,” *Comparative Studies in Society and History* 5.4 (1963): 378–400.

142 This will, however, not be the case with either the *Practica legum* or the *Ordo Bambergensis*, despite the latter’s lengthy discussion of proof in cap. xvi.

143 Bulgarus’ choice is prescient. For example, the *Institute’s* consideration of property and ownership would be influential. For example, Bracton would comment on it, on which see Ernst Kantorowicz, *The King’s Two Bodies. A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957), 87–88.

treatment of civil law,¹⁴⁴ and the *ordines* will accordingly treat it, Bulgarus frequently considers issues we shall not encounter in later chapters. A good example is how he reflects on donation. None of our *ordines* will discuss the *actio familiae hersicundae*, which concerns co-heirs.¹⁴⁵ The same is true for the *donatio inter vivos*,¹⁴⁶ a gratuitous donation transferring title to property made when neither party is in imminent danger of dying.

Bulgarus also considers whether an uncertain or invalid suit might later become valid. Were there any factors, changing circumstances, for example, that might permit this change? Might one judge's decision overturn an earlier ruling? We see here Bulgarus' sensitivity to context and how it affects the law. Another example is when he emphasizes the necessity for the judge to act more leniently when matters were doubtful or when there was reason for mercy.¹⁴⁷ While never referring to dispensation, his argument reminds us of similar points made by canonists,¹⁴⁸ including the later *Ordo Bambergensis* (cap. xiii).

Bulgarus' letter was influential. If none of the remaining treatises in this study cites it expressly,¹⁴⁹ we can be certain that it, along with the rest of his commentary on the civil law, was familiar, in varying degrees, to the jurists and students of the early *ius commune*. The following translation, to my knowledge,

144 On property law in Late Antiquity and its subsequent influence, see Nicholas Everett, "Law Documents and Archives in Early Medieval Spain and Italy, c. 400–700," in *Documentary Culture and the Laity in the Early Middle Ages*, ed. Warren C. Brown, et al. (Cambridge: Cambridge University Press, 2013), 66–68.

145 On its treatment, however, by others, Litewski, *Zivilprozeß*, 199 and n. 177

146 Compare, however, *Questionibus de juris subtilitatibus. Zur zweiten Säcularfeier der Universität zu Halle als Festschrift für ihre juristische Fakultät*, ed. Hermann Fitting (Berlin, 1894, rp. Frankfurt am Main: Keipel, 1977), 69. That Bulgarus may have influenced, however, the Pseudo-Imerian *Questionibus* and, possibly, the *De edendo*, Kantorowicz, *Studies*, 34–36, Coing, *Handbuch*, §47, and Cortese, "Theologie," 72–73, arguing that the former's reference to the Bible suggests it may have not come from a 'legist.' See also chapter 3 for further discussion of the possible relation between the *Quaestiones* and the Pseudo-Ulpianus, *De edendo*, especially in light of the research by André Gouron.

147 In this regard, Ivo of Chartres would have approved. See Brasington, *Ways of Mercy*, 101–04.

148 For an orientation, Hans Martin Klinkenberg, "Die Theorie der Veränderbarkeit des Rechts im frühen und hohen Mittelalter," in *Lex et sacramentum im Mittelalter*, ed. Paul Wilpert (Berlin: de Gruyter, 1969), 157–58.

149 That the letter was well-known is demonstrated by citations from the civilian, Rogerius, and the first decretist, Paucapalea. See below.

is the first of the complete text.¹⁵⁰ When comparing Hariulf's account to it, we see the trajectory of ecclesiastical process during the course of the twelfth century. Haimeric got more than an answer to his request for legal assistance. He received a primer on how an ecclesiastical judge might use the civil law in court. The *ordines* in the following chapters will build upon it.

Concerning arbiters, advocates, plaintiffs and defendants, accusations, witnesses, sentences, and appeals.¹⁵¹

To the most dear Lord A, by the grace of God chancellor of the holy Roman Church, from B, greetings in Christ and fellowship in the mysteries of the law. We received with humble affection the message Your Serenity sent. Accordingly, with the help of God, we happily proceed to the very difficult task you have assigned.¹⁵²

§We call an arbiter one to whom the plaintiff and defendant agree to commit the role of judge.¹⁵³

150 Compare, however, Professor Pennington's translation of selected passages, <http://faculty.cua.edu/pennington/Law508/BulgarusDeArbitris.htm> accessed on 25 January 2014. One might also compare a translated section from Bulgarus' *Stemma*, based on the edition by Kantorowicz, *Studies*, 246–47, by Winroth, "The Teaching of Law," 56–57 who also, in collaboration with Joshua Tate, emends the edition.

151 On this title, comparing it with a similar text in the late eleventh-century canonical collection of Cardinal Deusdedit, Fried, "Die römische Kurie," 161 and n. 28.

152 The organization of the letter, largely followed by the later, more elaborate *ordines* in this volume, is juristic in nature, not logical, at least as understood by the dialectical hermeneutic of the early glossators. Indeed, none of the *ordines*, including Bulgarus' letter, attempt to harmonize conflicting legal texts through dialectical hermeneutics. See, in general, Gerhard Otte, "Logische Einteilungstechniken bei den Glossatoren des römischen Rechts," in *Dialektik und Rhetorik*, 133–55, also Christoph Meyer, *Das Distinktionstechnik in der Kanonistik des 12. Jahrhunderts. Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters* (Louvain: Leuven University, 2000), 77–79 for the school of Pavia and the early technique of organization found at Bologna and 94–98 on Bulgarus concentrating, however, on the *De regulis*, not the letter to Haimeric.

153 For the civil law, Ivan Milotić, "An Outline of Arbitral Procedure in Roman Law," *Forum historiae iuris* accessed at <http://www.forhistiur.de/zitat/1301milotic.htm> on 25 January 2013. See also Linda Fowler, "Forms of Arbitration," in *Proceedings Toronto*, 133–35, and Litewski, *Zivilprozeß*, 126 on Bulgarus' distinction between arbiter and judge, also Pennington, "Big Bang," with comparison as well to Gratian's later treatment of arbiters and judges. For a detailed examination of arbitration in a single diocese during the late twelfth and early thirteenth century, Rainer Murauer, *Die Geistlichegerichtsbarkeit im Salzburger Eigenbistum Gurk* (Oldenbourg: Böhlau, 2009), 78–99. As Murauer notes, the Fourth Lateran Council (c. 40) would eventually prohibit any lay involvement in

§The judge presides over jurisdiction,¹⁵⁴ as the praetor,¹⁵⁵ governor, prefect of the city, or one delegated by these men to whom all things are common.¹⁵⁶ In the presence of the most sacred Gospels,¹⁵⁷ he examines with circumspection the cases of both parties.¹⁵⁸ He ensures that both plaintiff and defendant take the oath concerning calumny,¹⁵⁹ namely that the suit is neither brought through calumny nor falsely contested.¹⁶⁰ The judge strives to settle trials and decide suits without stain or fraud, sometimes by acquitting, sometimes by condemning.¹⁶¹ To the convicted

arbitrating an ecclesiastical dispute. On this section of Bulgarus, Litewski, *Zivilprozeß*, 579–81, also 583 and n. 100, on this compromise, comparing *Ordo Bambergensis*, cap. xviii. Noting that in Lucca, ‘churches were happy to use lay arbiters . . . even for strictly ecclesiastical disputes,’ Wickham, *Courts and Conflict*, 61.

- 154 Compare Dig. 3.1.2. In general, Kaser, *Zivilprozeßrecht*, 232 n. 8 and 233 n. 11; also for Bulgarus here, Litewski, *Zivilprozeß*, 86, 583, on the contrast between arbiter and judge. See also a letter of Innocent II (JL 7696) discussed by Harald Müller, “Entscheidungen auf Nachfrage. Die delegierten Richter als Verbindungsglieder zwischen Kurie und Region sowie als Gradmesser päpstlicher Autorität,” in *Römisches Zentrum und kirchliche Peripherie. Das universale Papsttum als Bezugspunkt der Kirchen von den Reformpäpsten bis zu Innocenz III*, ed. Jochen Jorendt, et al. (Berlin: Walter DeGruyter, 2008), 123–24 and n. 38, on its importance in the developing papal control over appeals and Pope Innocent’s comments on the shortcomings of judges; also Pennington, “Roman Law,” 249.
- 155 This is also found in the *Practica legum*, cap. 21, on which see Litewski, *Zivilprozeß*, 80 n. 23.
- 156 On this definition by Bulgarus, Litewski, *Zivilprozeß*, 86 and n. 124.
- 157 Litewski, *Zivilprozeß*, 139 and n. 885, also comparing the *Ordo Bambergensis*, cap. xvii as well as numerous other twelfth-century *ordines* and the earlier, civil-law use of the Gospel book.
- 158 Cod. 1.4.27.3. On the prevalence of the *Codex* in the earlier treatises during the revival of the Roman law, Bellomo, *The Common Legal Past*, 61. For the principal *summae* on the *Codex*, for example by Placentinus, Eljjo J.H. Schrage, with Harry Dondorp, *Utrumque Ius. Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts* (Berlin: Duncker and Humblot, 1992), 40–41. Also, on Bulgarus’ use here of *examinare*, Litewski, *Zivilprozeß*, 366.
- 159 On the *sacramentum calumniae* in a relatively contemporary (1157) Italian dispute in Lucca between a church and a layman over land, Wickham, *Courts and Conflict*, 32–33, also 35 for a slightly earlier example in a dispute between a monastery and a nobleman. As Wickham notes, in this second example the oath was used to compel, probably as planned by the arbiter, one party to yield.
- 160 As noted above, calumny and the oath *de calumnia* were important to the early *ius commune* and will be treated extensively in the *ordines* examined in upcoming chapters.
- 161 On this distinction, *quandoque . . . quandoque* in our treatise, Meyer, *Distinktionstechnik*, 97 and n. 166, also, for condemnation and absolution, Litewski, *Zivilprozeß*, 465 n. 206, comparing the *De edendo*, on which see chapter 3.

he grants, as a rule of law, a four-month period to respond.¹⁶² He never extends this time for the sake of the quality of the case, or the person's obedience or contumacy, nor does he shorten it.

§Here is what is proper to the arbiter and the judge.¹⁶³ Private individuals choose an arbiter,¹⁶⁴ while public power,¹⁶⁵ the prince or those serving under him, appoints the judge.¹⁶⁶ Both parties pledge the arbiter that if his sentence is not obeyed, the party shall be punished.¹⁶⁷ Let the parties either deposit with him the properties which are the reason for the dispute,¹⁶⁸ so they may be presented to the winning party or, instead, let the arbiter gather other things in place of a pledge so that he may fulfil the sentence or, finally, a promise is made through a stipulation to fulfil the sentence.¹⁶⁹ A judge, however, allows himself neither to become involved in an arbitration,¹⁷⁰ nor compels anything to be pledged or left to him as a deposit, nor promises to execute the judgment, but only to appear in court. The decision of the arbiter does not, as a rule, provide grounds for a charge or an exception.¹⁷¹ The judge's decision provides

162 Cod. 7.54.3.3. On this, Kaser, *Zivilprozeßrecht*, 609 n. 28 and 624 n. 5, also Litewski, *Zivilprozeß*, 541 n. 43, with reference also to the *De edendo*, the *Ordo Bambergensis*, cap. iii, and *Olim edebatur actio* §591. On *Olim*, an *ordo* contemporary with the *De edendo* and also useful to compare with the *Ordo Bambergensis*, see chapters 3 and 5.

163 That often in Late Antiquity the difference between both was not this clearly defined, see the Introduction, also Harries, "Resolving Disputes," 77–78.

164 Litewski, *Zivilprozeß*, 578. On the reasons why an individual would choose either arbitration or judgment, Wickham, *Courts and Conflict*, 102. See also the Conclusion to this study.

165 This is not treated by the other *ordines* considered in this volume. See Litewski, *Zivilprozeß*, 86 n. 125, 87 n. 132. Litewski, citing Hermann Kantorowicz, also notes the emendation of the edition from *aut* to *ut*.

166 Pennington, "Practical Use," 22 and, for Bulgarus here, Litewski, *Zivilprozeß*, 86 and 87, also n. 137, noting the emphasis on the source of the judge's power, in the case of the classical source, the emperor.

167 Litewski, *Zivilprozeß*, 578–80.

168 That this is not the civil-law form of sequestration, Litewski, *Zivilprozeß*, 268, also noting that the majority of *ordines* do not discuss it. A notable exception will be *Ordo Bambergensis*, cap. v.

169 On *stipulatio*, see below in Bulgarus' discussion of the *regulae iuris*.

170 Dig. 4.8.9.2 See also Litewski, *Zivilprozeß*, 582 and n. 82, comparing *Ordo Bambergensis*, cap. xviii and 586 and n. 151, comparing both the *De edendo* and *Ordo Bambergensis*, cap. xviii, on the use of *sententia* for the arbiter's decision.

171 Litewski, *Zivilprozeß*, 588 n. 185.

both. The arbiter's decision does not declare infamy;¹⁷² however, the sentence of the judge does. Furthermore, the arbiter must not be chosen by a religious oath.¹⁷³ If, however, he has wrongly and illegally sworn, he shall answer to God. If the oath was given imprudently, this will not injure the parties. The judge swears to judge each truthfully and, observing the laws, with what seems to him just.¹⁷⁴ The arbiter does not intervene in a criminal case nor in one concerning freedom;¹⁷⁵ however, the judge hears both cases. The arbiter's decision is not suspended by appeal;¹⁷⁶ the decree of the judge,¹⁷⁷ however, is rescinded by a valid challenge. Even if unjust, the decision of the arbiter shall stand;¹⁷⁸ however, with an appeal having been made, a judge's decision may be changed.¹⁷⁹ Let this brief statement

-
- 172 As Brundage, *Medieval Origins*, 318 notes, Dig. 3.2 is entirely devoted to *infamia*, an indication of its significance in the classical civil law. For canon law, among many studies, Peter Landau, *Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa ordinaria*, (Cologne and Vienna: Böhlau Verlag, 1966), also Edward Peters, "Wounded Names: The Medieval Doctrine of Infamy," in *Law in Mediaeval Life and Thought*, ed. Edward B. King, et al. (Sewanee: Sewanee Medieval Colloquium, 1990), 43–73, with emphasis on, among other things, the Pseudo-Isidorian transmission of texts to Gratian and subsequent decretist comment. He does not discuss the *ordines*. There is no section dedicated to *infamia* in the *ordines* considered in this volume, though it will be an issue in sources cited by the *Ordo Bambergensis*, on which see chapter 5. That the arbiter does not declare infamy, Litewski, *Zivilprozeß*, 588 n. 183, comparing Bulgarus here with the *Ordo Bambergensis*, cap. xviii.
- 173 See Kaser, *Zivilprozeßrecht*, 225 n. 47, 228–31. There are numerous texts to consider: Dig. 2.11.9pr., Dig. 2.11.9.1, Dig. 2.11.10pr., Dig. 2.11.10.1, Dig. 2.11.10.2, Dig. 2.11.11, Dig. 2.11.12, pr. On this passage in Bulgarus, Litewski, *Zivilprozeß*, 580 n. 54 and 585 n. 127.
- 174 Cod. 3.1.14. On this influential text, emphasizing the subsequent importance and necessity of the judge's public oath, André Gouron, "Medieval Courts and Towns: Examples from Southern France," *Fundamina. A Journal of Legal History* 1 (1992): 35, rp. in his *Juristes et droits savants*, cap. xiv.
- 175 On the *causa liberalis*, Berger, *Encyclopedic Dictionary*, 563 and, for Bulgarus here on the judge's jurisdiction, Litewski, *Zivilprozeß*, 103 n. 358.
- 176 On the appeal to the judge as a form of suspension, Litewski, *Zivilprozeß*, 506.
- 177 On the meaning of *decretum* and *decreta* here and in the *ordines*, Litewski, *Zivilprozeß*, 457 and n. 97.
- 178 Litewski, *Zivilprozeß*, 587 and n. 172, comparing also *De edendo* and the *Ordo Bambergensis*, cap. xviii as well as other *ordines*.
- 179 On the various terms used by Bulgarus in connection with the judge's decision concerning appeal, Litewski, *Zivilprozeß*, 521.

about the commonalties and differences in the offices of judge and arbiter suffice.¹⁸⁰

§ Advocates are patrons who enter the court to offer help to each party.¹⁸¹ Their duty is to plead the cases as long as they will.¹⁸² So that there is no occasion for base profit or ill-gotten gain but, instead, that there may be praiseworthy arguments, they ought to plead what the case requires and to refrain from injury and not argue abusively.¹⁸³ Otherwise, they are marked by shame. They also ought not intentionally prolong the dispute. Moreover, after the lawsuit has been contested, they must swear a sacred oath that they judged with all their skill and effort what was just and true,¹⁸⁴ and took care to plead on their client's behalf, having spared nothing from their efforts. Nevertheless, if they omitted something, the judge shall supply it with his skill.¹⁸⁵ Any error by the advocates shall not harm the litigants if they challenge it immediately, that is, within three days.¹⁸⁶ It ought to be presumed that if someone ordered to produce or restore the value of the thing does not obey, he is condemned by the judge. The adjudicated case is considered a correct judgment.¹⁸⁷ Nevertheless, if what

-
- 180 On the office of the judge, Litewski, *Zivilprozeß*, 124, also n. 669, comparing the *De edendo* and the *Ordo Bambergensis*, cap. xvii. That judges and arbiters were, however, often the same persons, Wickham, *Courts and Conflict*, 102.
- 181 See, in general, Mousurakis, *Historical and Institutional Context*, 212. On Bulgarus' emphasis on the advocate's role in defense, Litewski, *Zivilprozeß*, 177 n. 28.
- 182 In general, Brundage, *Medieval Origins*, 170, Nörr, *Prozessrecht*, 33–34 and n. 178, and Litewski, *Zivilprozeß*, 177, 180 (comparing Bulgarus' expression *causas perorare* with phrases in other *ordines*) also 177 n. 15 comparing the definition of the advocate in the *De edendo*. On the importance of Bulgarus' treatment of the advocate here, André Gouron, "Le Rôle de l'avocat selon la doctrine romaniste du douzième siècle," in *L'assistance dans la résolution des conflits. Quatrième partie* (Bruxelles: De Boeck Université, 1998): 7–8, rp. in his *Pionniers du droit occidental au Moyen Âge*, (Aldershot: Ashgate, 2006), cap. xv.
- 183 On the professional ethics of advocates, in general, James Brundage, "The Ethics of Advocacy: Confidentiality and Conflict of Interest in Medieval Canon Law," in *Nordic Perspectives on Medieval Canon Law*, ed. Mia Korpiola (Helsinki: University of Helsinki, 1999), 3–17 and, for the passage in Bulgarus, comparing also the *De edendo*, *Olim edebatur actio* §329, and *Ordo Bambergensis*, cap. viii, Litewski, *Zivilprozeß*, 181 and n. 85.
- 184 On this moral demand, Litewski, *Zivilprozeß*, 181.
- 185 Cod. 2.10.1. See Kaser, *Zivilprozeßrecht*, 596 n. 4 and, especially, Nörr, *Zur Stellung des Richters*, 17 and *Prozessrecht*, 188–89 and n. 603.
- 186 Litewski, *Zivilprozeß*, 182 and n. 100, comparing also the *De edendo*, *Olim edebatur actio* §334.
- 187 Dig. 50.17.207. Literally "considered true." For the classical law, Kaser, *Zivilprozeßrecht*, 616 n. 16 also, generally, Nörr, *Prozessrecht*, 206–07, treating, for example, the twofold meaning of the decision reached in judgment and its resulting legal force, and Litewski, *Zivilprozeß*,

was judged from a false document or testimony, whose faith is in doubt, is recalled within the time of the judgment,¹⁸⁸ the sentence is retracted if the testimony or charter be proven false.¹⁸⁹

§The plaintiff is the one who first sues, saying that something is his, or a person is obligated to give or do something for him.¹⁹⁰ However, if the defendant, determined to resist, opposes an exception to avoid condemnation, he is understood to be a plaintiff.¹⁹¹ Indeed, it seems that he is suing who employs an exception.¹⁹²

§The defendant is the one against whom the suit is being brought, since he may be said either to possess or to owe.¹⁹³ The plaintiff must be compelled to prove his case if he wishes to obtain what he seeks.¹⁹⁴ If the

476, comparing the later *Olim edebatur actio*, §665 and the *Ordo Bambergensis*, cap. xx, xxi. For use in ecclesiastical documents from the middle of the twelfth century, Murauer, *Gerichtbarkeit*, 38 though without reference to Bulgaria; see also Andrea Bettetini, “*Res iudicata e veritas nel pensiero canonico classico*,” in *Proceedings Catania*, 383–99. *Res iudicata* will figure in other *ordines* treated in this study.

188 On *revocare* here, Litewski, *Zivilprozeß*, 485 and n. 8; compare also the *De edendo* in chapter 3. See also Mausen, *Veritatis adiutor*, 771 and n. 87 on sanctions in this instance, noting, in addition to the *De edendo*, also the *Ordo Bambergensis*.

189 Among many studies, with focus on Italy, see Giovanna Nicolaj, “*Originale, authenticum, publicum: Una sciarada per il documento diplomatico*,” in *Charters, Cartularies and Archives: The Preservation and Transmission of Documents in the Medieval West*, ed. Adam J. Kostko and Anders Winroth (Toronto: University of Toronto Press, 1999), 8–21; for Francia, Hans Hummer, “The Production and Preservation of Documents in Francia: The Evidence of Cartularies,” in *Documentary Culture and the Laity*, 218. With focus on documents in legal proceedings, Nörr, *Prozessrecht*, 155–56. Later *ordines* will discuss this at length, on which see Litewski, *Zivilprozeß*, 535 n. 146, also 536–37, discussing *De edendo*, the *Ordo Bambergensis*, cap. xxi, and *Olim edebatur actio* §669.

190 Pennington, “Roman and Secular Law,” <http://faculty.cua.edu/pennington/Law508/Germanic%20Law/histlaw.htm> accessed on 28 February 2014, who also prints this section.

191 Litewski, *Zivilprozeß*, 363 and n. 128, also discussing the *De edendo*, noting that it more specifically discusses the burden of proof, and also the *Ordo Bambergensis*, cap. xii.

192 Dig. 44. 1. 1. For the classical law, Kaser, *Zivilprozeßrecht*, 598, also C.H. van Rhee, “The Role of Exceptions in Continental Civil Procedure,” in *Adventures of the Law. Proceedings of the Sixteenth British Legal History Conference*, ed. Paul Brand, et al. (Dublin: Four Courts Press, 2005), 88–105. Exceptions will be treated in far greater depth by the *ordines* considered later in this volume.

193 Litewski, *Zivilprozeß*, 146 noting Bulgaria’s definition of the accused as the ‘passive party.’

194 Discussing this in relation to the maxim *probatio incumbit*, found in other *ordines*, Litewski, *Zivilprozeß*, 362 and nn. 120–121, with reference to the *De edendo* and the *Ordo Bambergensis*, cap. xii, xvi.

plaintiff does not prove his case,¹⁹⁵ the defendant wins, even if he did not offer evidence, since defendants are more favored than plaintiffs.¹⁹⁶ Concerning defendants, it is also said that the laws are more prone to absolve them than to condemn.¹⁹⁷ When the defendant is the plaintiff in an exception, then he ought to prove it.¹⁹⁸ In one case he will not prove the exception: whoever in the hope of future payment obligated himself by means of a stipulation or chirograph. If sued, he rightly opposes the exception of unpaid money within a biennium.¹⁹⁹ The burden of proof does not threaten him, perhaps because the fact of denying is naturally no proof.²⁰⁰ Besides, we consider those same things said about the

-
- 195 Cod. 2.1.4. On this text and the classical principle that the burden of proof lies on the plaintiff, Kaser, *Zivilprozeßrecht*, 363 n. 16, also Litewski, *Zivilprozeß*, 362 and n. 122, for Bulgarus, *De edendo* and *Ordo Bambergensis*, cap. xii, xvi.
- 196 Dig. 50.17.125: *Favorabiliores potius quam actores habentur*. For a brief discussion of *favor rei* in twelfth-century civilian thought, Yves Mauten, “Pugio malignitatis: Violence du procès et prudence de la procédure,” in *Violences souveraines au Moyen Âge. Travaux d'une école historique*, ed. François Forand, et al. (Paris: Presses universitaires de France, 2010), 15–16, also Kaser, *Zivilprozeßrecht*, 598, and Litewski, *Zivilprozeß*, 362. None of the *ordines* considered in this study treat this. On the maxim in *dubio pro reo*, James Q. Whitman, *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial* (New Haven and London: Yale University Press, 2008), 122–23.
- 197 Litewski, *Zivilprozeß*, 468. Again, this is not found in the other *ordines*.
- 198 Compare Dig. 22.3.19, also Dig. 44.1.1. In general, Kaser, *Zivilprozeßrecht*, 256–57, Litewski, *Zivilprozeß*, 147, also Kenneth Pennington, “Roman and Secular Law,” <http://faculty.cua.edu/pennington/Law508/Germanic%20Law/histlaw.htm> accessed on 11 July 2013.
- 199 Cod. 4.30.3. For the classical law, Ernst Levy, “Die Querela non Numeratae Pecuniae,” *ZRG RA* 70 (1953): 214–46, rp. in his *Gesammelte Schriften*, 1.425–45, also Jan Hallenbeek, “Developments in Medieval Roman Law,” in *Unjust Enrichment. The Comparative Legal History of the Law of Restitution*, ed. Eltjo H. Schrage (Berlin: Duncker and Humblot, 1995), 68, contrasting Bulgarus and Martinus., The *Summa Trecensis* also considered the *querela non numeratae pecuniae*, on which see Kantorowicz, *Studies*, 155. Concern for the *cautio*, or surety, will figure in the later *ordines* For the classical law, Kaser, *Zivilprozeßrecht*, 487 and n. 20 and Litewski, *Zivilprozeß*, 364 n. 150 for Bulgarus. There is also an echo of *numeratam pecuniam* in Herbert of Bosham's *Vita sancti Thome*, on which see Anne J. Duggan, “Roman, Canon, and Common Law in Twelfth-Century England. The Council of Northampton (1164) Re-Examined,” *Historical Research* 83.221 (2010): 385. For more on this important essay, see chapter 3.
- 200 Cod. 4.19.23. That an unproven crime could not be punished, Litewski, *Zivilprozeß*, 62 n. 123, noting Bulgarus, along with the *De edendo* and the *Ordo Bambergensis*, cap. xii, xvi. See also Helmholz, *The Ius Commune in England*, 113, with reference to C 2 q. 1 c. 13.

suit should be stated as well about the replication,²⁰¹ exception, and duplication.²⁰² For just as the action and replication aid the plaintiff, so exception and duplication assist the defendant.²⁰³ Thus, the defendant must prove, for it is fair to burden someone with the necessity to prove who, when he has done so, is helped in his defense. Indeed, as to proof a moveable property is not distinguished from immoveable by means of its movement.

§All are permitted to accuse, with these exceptions: a woman because of her sex;²⁰⁴ a boy because of age;²⁰⁵ a soldier who merits the soldier's pay because of the military oath;²⁰⁶ a magistrate, for example the consul or praetor;²⁰⁷ because of a delict, as in the case of the infamous;²⁰⁸ on account of base gain, as those who received money for accusing or not; on account of condition, as freedmen against patrons;²⁰⁹ on account

201 On *replicatio*, Berger, *Encyclopedic Dictionary*, 675. This was the plaintiff's exception in response to the defendant's exception. In general, Litewski, *Zivilprozeß*, 363 and n. 133, See also Inst. 4.14 and Litewski, *Zivilprozeß*, 316 and n. 260, comparing also here *Ordo Bambergensis*, cap. xii.

202 On *duplicatio*, Berger, *Encyclopedic Dictionary*, 675. *Duplicatio* enabled the defendant to oppose the plaintiff's *replicatio*. For the early Roman law, Mousourakis, *Historical and Institutional Context*, 205 and, in general, Nörr, *Prozessrecht*, 104 and the *Ordo Bambergensis*, cap. xii.

203 Dig. 44.1.2.1. Exceptions of all types play an important role in the later *ordines*. For the classical text here, Kaser, *Zivilprozeßrecht*, 266, also Litewski, *Zivilprozeß*, 426 n. 249 and 476.

204 Cod. 9.1.12. See Pennington, "Practical Use," 24 arguing for Bulgarus' influence here on C 15 c. 3 d.a.c. 1 Gratian believed women could testify, especially in cases concerning adultery, on which see René Metz, "Le statut de la femme en droit canonique medieval," *Recueils de la Société Jean Bodin* 12 (1962): 105, rp. with same pagination in his *La femme et l'enfant dans le droit canonique medieval* (London: Variorum, 1985). On this, see James Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago and London: The University of Chicago Press, 1990), 253 and n. 148, citing multiple texts, among them C 3 q. 7 d.p.c. 1, also *The Medieval Origins*, 190–91 on legal assistance to those in need, including the poor and women, and "Juridical Space: Female Witnesses in Canon Law," *Dumbarton Oaks Papers* 52 (1998): 147–56, discussing some decretist commentary but none of the *ordines* considered in this study. Compare, for Italy, Wickham, *Courts and Conflict*, 264–66.

205 Cod. 9.51.13.2.

206 Dig. 22.5.8.

207 Dig. 22.5.21.1. Kaser, *Zivilprozeßrecht*, 48 n. 21, See also Dig. 48.2.12pr.

208 Gratian agreed. Brundage, *Law, Sex, and Christian Society*, 253 and n. 147, cites various examples, among them C 6 q. 1 c. 15–19.

209 The probable source for this list is Dig. 48.2.8. Compare also Dig. 22.5.4, on which also see Kaser, *Zivilprozeßrecht*, 367 and n. 54 and, for twelfth-century discussion of the advocate's qualifications, Brundage, *The Medieval Origins*, 173 and n. 23, though without reference

of suspicion of calumny, as those who were bribed and spoke false testimony.²¹⁰ (Others include) those by reason of poverty, for example persons having less than 50 *aurea*.²¹¹ Yet they are not excluded if they are defending themselves or pursuing their own injury or the death of a relative.²¹² Others are those damned by public judgment, or brought into the arena to fight with wild beasts, or those who practiced pandering or actors in the theater;²¹³ also sons do not have the right to accuse the mother nor, even less, can one brother accuse another of a serious or capital crime.²¹⁴ Also, he who accused two cannot accuse a third.²¹⁵ Likewise, the voice of a familiar or a slave ought rather be silenced than be heard against one familiar to him or a master,²¹⁶ save in the crime of *maiestas*,²¹⁷ the *annona*, the diminished grain supply of the Roman people,²¹⁸ forgery,²¹⁹ or if a lord suppressed a testament which a slave asserted had granted him freedom.²²⁰ Sometimes the accusation is not completely prevented but, instead, suspended, and the name of the defendant, that is of the accused, eliminated.²²¹ Nevertheless, let the power of renewing the accusation against the defendant remain, for example, if there be no inscription or other things which are necessary.²²² In the inscription, it is proper to have the names of the accuser and defendant, the crime and law, the consul, the name of the crime, the time, that is the month when it was

to the *ordines*. Arguing that Gratian also knew this passage from Bulgarus, Pennington, "Practical Use," 24–25.

210 Dig. 48.2.9, also Mausen, *Veritatis adiutor*, 761–62 and n. 41.

211 Dig. 48.2.10. The classical gold *aureus* was worth 25 *denarii*, silver pennies.

212 Dig. 48.2.11pr. On Bulgarus here, Litewski, *Zivilprozeß*, 154 n. 133, noting that some subsequent *ordines*, though not those considered in this study, extended the woman's right to plead (*postulare*) on behalf of other people.

213 Dig. 48.2.4.

214 Cod. 9.1.13.

215 Cod. 9.1.16. See also Dig. 48.5.6.3.

216 Cod. 9.41.7.

217 Dig. 48.18.10.1. See Kaser, *Zivilprozeßrecht*, 453 n. 12.

218 Dig. 48.12.2pr. and Dig 9. 47.11.6pr. Offenses against the grain supply were a state crime in the classical law, on which see Robinson, *Criminal Law*, 89 and n. 212.

219 On *falsum* in the classical law, Mousourakis, *Historical and Institutional*, 318 and Robinson, *Criminal Law*, 86–88 and, in general, Cod. 9.22, the *Lex Cornelia de falsis*.

220 Dig. 5.1.53. Compare also Dig. 48.10.7. On these texts, Kaser, *Zivilprozeßrecht*, 453 n. 12, 483 n. 20, 453 n. 14, also Giovanni Minnucci, "Diritto e processo penale nella primat trattistica del xii secolo: qualche riflessione," in *Ins Wasser geworfen*, 589 and nn. 35–38.

221 Dig. 48.2.3.1.

222 Dig. 48.2.7pr. See Kaser, *Zivilprozeßrecht*, 555.

done, and the place; but it does not require either the day or the hour. The formula (of such an inscription) appears in the laws: 'Titius accused Maevia by the *Lex Julia de adulteriis*²²³ that she had committed adultery with Gaius Seius in that city, in his house, in that month, during the tenure of these consuls.'²²⁴

§The rule concerning witnesses is as follows.²²⁵ The judge can compel us to testify and those living improperly can be coerced without prescription of court.²²⁶ Sometimes we are excused in all cases,²²⁷ as are the elderly who are ill,²²⁸ at other times, in some cases, as in public crime,²²⁹ we are admitted willingly against a relative.²³⁰ Sometimes we are excused,²³¹ sometimes, though unwilling, we can be compelled to testify.²³² Sometimes we are excused unwillingly and sometimes, though willing, are rejected, as are freeborn sons against parents and vice-versa.²³³ Certain witnesses are removed by the judge, others by exception.²³⁴ Those removed by the

223 These are standard, fictive names used in the classical law. See Kantorowicz, *Studies in the Glossators*, 247–51 for their use by Bulgarus and also Brundage, *Law, Sex, and Christian Society*, 29–31.

224 Dig. 48.2.3pr.

225 Summarizing the classical law, Mousourakis, *Historical and Institutional*, 233. On the judge's evaluation of testimony, Nörr, *Prozessrecht*, 150–54.

226 By late antiquity, only *illustres* were not required to give testimony, on which see Jolowicz, *Historical Introduction*, 458. On the *illustres*, see below. For the *praescriptio fori* at that time see, generally, Harries, *Law and Empire*, 27–28, 106 and 120. Its removal would have been a serious blow to the privileged classes. On the compulsion to testify as found in the *ordines*, generally, Litewski, *Zivilprozeß*, 394–95 and n. 580, with reference not only to Bulgarus but also to the *Ordo Bambergensis*, cap. xv; see also 122 and n. 649, noting the *De edendo*.

227 On this section, see Litewski, *Zivilprozeß*, 277, comparing the *De edendo* and *Ordo Bambergensis*, cap. iv, vii.

228 See above, Dig. 22.5.8. For the *ordines*' discussion of the excusal of the elderly and ill, as well as reference to Bulgarus, Litewski, *Zivilprozeß*, 396 and n. 618.

229 Litewski, *Zivilprozeß*, 396.

230 Dig. 22.5.4. See Kaser, *Zivilprozeßrecht*, 367 and n. 54 and Litewski, *Zivilprozeß*, 397.

231 Litewski, *Zivilprozeß*, 382 and n. 370, comparing Bulgarus here with other *ordines*, though none treated in this study.

232 Litewski, *Zivilprozeß*, 394 and n. 580, with reference to numerous later *ordines*, including *Ordo Bambergensis*, cap. xv.

233 Compare Dig. 22.5.3.5, which was received by Gratian at C 4 q. 2/3 c. 3 §34 On this text, Kaser, *Zivilprozeßrecht*, 67 n. 52, Mausen, *Veritatis adiutor*, 561 and n. 683, and Litewski, *Zivilprozeß*, 391 n. 513 noting also the *Ordo Bambergensis*, cap. xv on the inability of children to testify against parents.

234 Litewski, *Zivilprozeß*, 127 n. 712, 364 n. 145, 383 nn. 384, 389.

judge are those whose testimony is suspect;²³⁵ those removed by reason of exception are, for example, those convicted of a composing a slanderous poem, whom the laws judge wicked and incapable of giving testimony.²³⁶ One must examine witnesses' trustworthiness, dignity, character, and *gravitas*.²³⁷ Their condition should be especially considered, (for example) whether the witness is a decurion or plebeian,²³⁸ living an honorable or infamous life,²³⁹ wealthy or destitute,²⁴⁰ a friend or enemy of the one about whom he is testifying,²⁴¹ and whether or not the witnesses seem to deliver a single, premeditated statement.²⁴² Finally, a rescript declares that it is not fitting for the judge to rule immediately according to a set form of proof but, instead, should from his own judgment rule what or whom he believes or what seems insufficiently proven.²⁴³ There are

-
- 235 Compare Dig. 22.5.3pr. On this, Kaser, *Zivilprozeßrecht*, 605 and n. 63.
- 236 I take here a *lectio difficilior*, a more difficult but possibly more accurate reading against the edition's *de crimine*. See Dig. 22.5.21pr. and Litewski, *Zivilprozeß*, 388 n. 474.
- 237 Dig. 22.5.2.
- 238 Dig. 22.5.3, also received by Gratian at C 4 q. 2/3 c. 3§2. On this concern for the witnesses' status, *condicio*, Mausen, *Veritatis adiutor*, 481 and nn. 335, 338, comparing also the *De edendo* and *Ordo Bambergensis*.
- 239 Litewski, *Zivilprozeß*, 388 n. 460, also Mausen, *Veritatis adiutor*, 484 and n. 347, noting also an earlier formulation by Isidore of Seville, and also later usages by the *De edendo* and *Ordo Bambergensis*.
- 240 Mausen, *Veritatis adiutor*, 478 and n. 319, comparing also here, among various *ordines*, the *De edendo* and the *Ordo Bambergensis*.
- 241 See above, Dig. 22.5.3pr. The text was received by Gratian at C 4 q. 2/3 c. 3 §2, as well as in other places, on which see Mausen, *Veritatis adiutor*, 569–70 and n. 730, noting the considerable interest paid by medieval commentators. These criteria are discussed by Litewski, *Zivilprozeß*, 413 and n. 887, comparing also the *Ordo Bambergensis* cap. xv.
- 242 Dig. 22.5.3.1. On this passage in Bulgarus, and the *sermo meditatus*, Mausen, *Veritatis adiutor*, 608–09 and n. 73, noting also its treatment by Rogerius, Placentinus, and the *Ordo Bambergensis*, on which see chapter 5.
- 243 The older edition reads much differently and also provides a lengthy note, with reference to Dig 22.5.3§2. On judicial discretion, Laurent Mayali, "The Concept of Discretionary Punishment in Medieval Jurisprudence," in *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler*, 299–316. For this text and the judge's discretion as understood in the classical law, Kaser, *Zivilprozeßrecht*, 365 n. 31, Nörr, *Zur Stellung*, 18, 23, and Litewski, *Zivilprozeß*, 369 on Bulgarus' conception of the judge's 'free appraisal of proof' (freie Beweiswürdigung). He goes on to note that a formal theory of proof began to develop after Bulgarus. See also 413 n. 887 on this passage from the *Digest* in Bulgarus and in the *Ordo Bambergensis*, cap. xv.

cases in which any sort of witness is admitted,²⁴⁴ for example a gladiator or someone like him,²⁴⁵ (or) one convicted of composing a slanderous poem,²⁴⁶ but not without torture,²⁴⁷ as in counterfeiting.²⁴⁸ A praetor is admitted to testify in a case of adultery if he is not judging that case; if, however, he is to judge, he is not admitted to court,²⁴⁹ just as a patron, that is an advocate, is not admitted.²⁵⁰

§A trial is conducted by at least three persons: the plaintiff bringing the accusation, the defendant defending and, between them, the judge hearing the case.²⁵¹ The choosing of the effect of the law pertains to the form of the judgment and the judge's power and force.²⁵² The form is instituting and concluding the trial. In instituting the trial, we consider the persons, the matter, and both at the same time.²⁵³ He is a judge whom nature neither forbids, for example a mute,²⁵⁴ nor law, as the infamous

-
- 244 Litewski, *Zivilprozeß*, 388 n. 467 and Mausen, *Veritatis adiutor*, 504 and n. 427 on Bulgarus and the *crimen exceptum*.
- 245 Dig. 22.5.21.2. A gladiator numbered among the 'dubious persons' in the classical law, on which see Robinson, *Criminal Law*, 91–92.
- 246 Dig. 22.5.21pr, also found in Gratian at C 4 q. 2/3 c. 5 §15. Such concern went back to the *Twelve Tables*. On this point in Bulgarus, not shared with the other *ordines* in this study, Mausen, *Veritatis adiutor*, 491 and n. 382.
- 247 Litewski, *Zivilprozeß*, 381 n. 468.
- 248 See above, Dig. 5.1.53. That Bulgarus was first Bolognese jurist to comment on torture, Piero Fiorelli, *La tortura giudiziaria nel diritto commune*, 2 vols. (Rome: Giuffrè, 1953–1954), 1.118; see also Mausen, *Veritatis adiutor*, 494 and n. 392, noting also various later decretals which deal with this as well.
- 249 Litewski, *Zivilprozeß*, 394 n. 568, also Mausen, *Veritatis adiutor*, 536–73 and n. 575, comparing also *Ordo Bambergensis*, cap. xv.
- 250 Dig. 22.5.25 and Dig. 22.5.21.1. On Bulgarus here, Litewski, *Zivilprozeß*, 393–94 and n. 563, noting also the *Ordo Bambergensis*, cap. xv. See also Mausen, *Veritatis adiutor*, 540 and n. 590.
- 251 Summarizing the *cognitio extra ordinem* in the classical law, Mousourakis, *Historical and Institutional*, 307–09 and, on the threefold division, Stein, *Roman Law in European History*, 58, also Litewski, *Zivilprozeß*, 125 n. 677, and Nörr, *Zur Stellung*, 8–9, also noting influence in general in the Anglo-Norman world. He also notes Johannes Bassianus, who may have influenced the *Ordo Bambergensis*. See chapter 5 below. On *cognitio*, again, Nörr, *Zur Stellung*, 16–17 and *Prozessrecht*, 9–10 on *iudicium est actus trium personarum*.
- 252 Litewski, *Zivilprozeß*, 475 n. 353, comparing the *De edendo* and the *Ordo Bambergensis*, cap. xvii, both treating *res iudicata*.
- 253 On distinction between *persona* and *res*, Otte, *Dialektik und Jurisprudenz*, 63 also, generally, Litewski, *Zivilprozeß*, 86.
- 254 On those barred from testimony, Kaser, *Zivilprozeßrecht*, 119 and Inst. 2.10. See also Litewski, *Zivilprozeß*, 381.

who,²⁵⁵ though he could be an arbiter,²⁵⁶ nevertheless legally cannot be a judge.²⁵⁷ Some are unable to judge by reason of nature,²⁵⁸ for example, infants; others legally cannot, for example, slaves.²⁵⁹

§A delegated arbiter does not hear a case concerning freedom²⁶⁰ though, incidentally, he might judge, not about the case itself, but in declaring the principle that wins freedom.²⁶¹ Likewise, if he sues who does not have legitimate administration or grants the hearing, there is no judgment, since through a false proctor controversies are neither accustomed to be discussed nor judged.²⁶² This is the form in ending the dispute. In order to win, let the plaintiff state the charge and prove it. In a similar fashion, the defendant shall deny, plead an exception, and prove his case. Let the judge frequently question the parties and then declare his decision, with two years reserved in criminal cases, and three in pecuniary ones.²⁶³ Seated, he writes down and then recites (the decision) to both parties, ordering the judgment to be executed.²⁶⁴

255 Litewski, *Zivilprozeß*, 105 n. 400.

256 Litewski, *Zivilprozeß*, 581 n. 70, noting also the *Ordo Bambergensis*, cap. xviii.

257 Compare the *Ordo Bambergensis* on this point. See chapter 5.

258 On the distinction here between *natura* and *ius*, Litewski, *Zivilprozeß*, 105 n. 404.

259 See Inst. 2.10. On this disqualification, and others listed by Bulgarus, Litewski, *Zivilprozeß*, 104 and nn. 375–378. For a similar discussion, compare the *Ordo Bambergensis*, cap. xvii.

260 The term translated for ‘delegated arbiter’ is *pedanus*. Compare Cod. 3.3.2.1. For this and related terms like *iudex delegatus* in the post-classical civil law, Mousourakis, *Historical and Institutional*, 369 and, more specifically about our text, Pennington, “Practical Use,” 21 and n. 61, arguing for Bulgarus’ possible influence on Gratian at C 2 q. 6 d.p.c. 33.

261 Literally “the principle whose victory leads to freedom.” See Cod. 3.3.2pr. Delegation of the judge will concern the later *ordines*. On the classical *iudex pedaneus*, Kaser, *Zivilprozeßrecht*, 547–48 and, for Bulgarus here, Litewski, *Zivilprozeß*, 93 n. 221. The term appears in various *ordines*, but none treated in this study.

262 Cod. 2.12.24. Like delegated judgeship, proctors would receive extensive treatment in the *ordines*. For the classical law, Fabian Klinck, “Zur Bedeutung des Wortes Procurator in den Quellen des klassischen Rechts,” *ZRG RA* 124 (2007): 25–52, also Kaser, *Zivilprozeßrecht*, 560–61; Litewski, *Zivilprozeß*, 166 n. 154 on the *falsus procurator* here in Bulgarus, something not treated by the other *ordines* in this study. See also Nörr, *Prozessrecht*, 34. Proctors will be a significant concern in the *ordines* treated in upcoming chapters.

263 Cod. 3.1.13pr, on which see Kaser, *Zivilprozeßrecht*, 607, also Litewski, *Zivilprozeß*, 58 and n. 133 on Bulgarus’ distinction; see also Brundage, *The Medieval Origins*, 29 n. 99 and 192 n. 89 on the twelfth-century, though without referring to the *ordines*. Compare as well Cod. 3.1.13.8a and Dig. 22.1.35. See also Litewski, *Zivilprozeß*, 202 nn. 201, 214, also 305–06 n. 98 on the distinction between perpetual and temporal actions in Bulgarus and other *ordines*.

264 On the necessity of oral pronouncement in the presence of the parties, Litewski, *Zivilprozeß*, 461 and nn. 138–139, also 539 n. 9, with reference to the *De edendo* (on which see chapter 3 below) and *Olim edebatur actio* §670.

§Force and power are from joinder of issue and the judge's statement.²⁶⁵ A suit is renewed by declaration before witnesses so that might not cease, as it happens in the case of a temporal action being extended without interruption so that, about to pass to the heirs, it might not become usurious, which it had not been before.²⁶⁶ A suit is also renewed by judicial pronouncement,²⁶⁷ not by virtue of the law itself,²⁶⁸ but by means of an exception when the defendant brings a charge against the victorious plaintiff.²⁶⁹ However, where things are absent which ought to be absent, and those present, which ought to be, this can be correctly considered a judgment.²⁷⁰

§An appeal or *provocatio* is made to a superior judge against a sentence given by an inferior judge,²⁷¹ a *vocatio* or *proclamatio*.²⁷² It is permitted not only to the defeated party to appeal but also to one who has an interest in the case,²⁷³ for example the seller, with the buyer having been defeated or the principal, with his proctor having lost.²⁷⁴ It is appealed,

²⁶⁵ The terms are *contestatio* and *pronuntiatio*. On this passage in Bulgarus, stressing the importance of the *litis contestatio*, Litewski, *Zivilprozeß*, 330. See also Nörr, *Prozessrecht*, 50–51, 109–10. For *contestatio* as declaration in the presence of witnesses, Berger, *Encyclopedic Dictionary*, 412. The development of the *litis contestatio* is also treated by Mousourakis, *Historical and Institutional*, 209–10. Fundamental is Steffen Schlunker, *Litis contestatio. Eine Untersuchung über die Grundlagen des gelehrten Zivilprozesses in der Zeit vom 13. bis zum 19. Jahrhundert* (Frankfurt am Main: V. Klostermann, 2008).

²⁶⁶ Schlunker, *Litis contestatio*, 137 and n. 253 and Litewski, *Zivilprozeß*, 205 n. 257 on heritable and non-heritable actions, and 214, 334 nn. 460, 464 on *actiones usuriae* and *non usuriae* with reference to Bulgarus at this point. Litewski emphasizes how the *litis contestatio* could lead to non-heritable actions exceeding their time-limit and thus becoming heritable.

²⁶⁷ On the *pronuntiatio*, which could have the sense of an interlocutory decision, Berger, *Encyclopedic Dictionary*, 657.

²⁶⁸ Contrasted with *ope exceptionis*, Berger, *Encyclopedic Dictionary*, 516.

²⁶⁹ See Litewski, *Zivilprozeß*, 305–06 n. 98 with reference as well to the *De edendo* and the *Ordo Bambergensis*, cap. x.

²⁷⁰ Litewski, *Zivilprozeß*, 470 on this passage, noting both a positive and negative definition of judgment. For a brief summary of appeal in the post-classical law, the foundation of Bulgarus' exposition, see Mousourakis, *Historical and Institutional*, 372–73.

²⁷¹ On the appellate judge as 'superior,' Litewski, *Zivilprozeß*, 516 and n. 363.

²⁷² Paucapalea, *Summa*, ed. Johann Friedrich von Schulte (Giessen, 1890, rp. Aalen: Scientia Verlag, 1965) ad C 2 q. 6. Paucapalea may be drawing on Bulgarus at this point. On *provocatio/provocare*, Litewski, *Zivilprozeß*, 490–91, also n. 10, comparing the *De edendo*.

²⁷³ Dig. 49.1.4.2. Kaser, *Zivilprozeßrecht*, 506 and nn. 36, 40.

²⁷⁴ Dig. 49.1.5pr, also compare Dig. 49.1.4.5 On these texts, Kaser, *Zivilprozeßrecht*, 506 n. 40, 504 n. 18. The relationship between *dominus* and *procurator* will be considered at length by later *ordines*, for example the *Ordo Bambergensis*, cap. vi.

however, when the sentence was made against equity or against the right of the litigator,²⁷⁵ not against the constitution.²⁷⁶ A sentence brought against the constitutions would be, for example, if it were judged that a minor younger than fourteen were able to testify or that one by reason of freeborn children or poverty or similar things could not be excused from guardianship and curatorship.²⁷⁷ Then there is no need for appeal. Against the right of the litigator it is thus pronounced if a judge did not grant that you proved your minority or number of freeborn children but, instead, ruled against you, denying that you had proven your claim. In this case, an appeal is necessary,²⁷⁸ and it suffices to appeal orally on the day when the sentence is made.²⁷⁹ Otherwise, a time of ten days has been fixed for bills of appeal to be given.²⁸⁰ However, with this appeal made, all things ought to be remain in that state until a higher judge approves or corrects the decision.²⁸¹ However, just as there is no need for appeal if the decision were made against the law, it is so if the judge gave a sentence due to a bribe. Sometimes the reason for the appeal being allowed is invalid, for example concerning temporary possession.²⁸²

§The consultation is that case where one decides whether it was correctly appealed or judged.²⁸³ The time for consultation used to be observed according to deadlines: the first, six months, the second, third,

275 Litewski, *Zivilprozeß*, 471 n. 297, comparing also *Ordo Bambergensis*, cap. xvi.

276 On this section of Bulgarus' letter, Litewski, *Zivilprozeß*, 472. Bulgarus devotes more attention to invalid decisions than do the *ordines* treated in upcoming chapters.

277 Dig. 49.8.1.2. See Kaser, *Zivilprozeßrecht*, 505 and n. 27 and Nörr, *Prozessrecht*, 32 on the curator.

278 The other *ordines* in our study do not consider this, on which see Litewski, *Zivilprozeß*, 511.

279 Litewski, *Zivilprozeß*, 509.

280 Dig. 49.1.5.4. The time of appeal concerned the classical law, on which see Kaser, *Zivilprozeßrecht*, 507 and nn. 56, 58–59. Arguing that Gratian may have learned this from Bulgarus here, Pennington, "Practical Use," 20 and n. 55, with reference to Nov. 23 pr. (*Authenticum* 4.2). On the *fatales dies* here, deadlines for appeal, Litewski, *Zivilprozeß*, 518–19.

281 See Pennington, "Big Bang," citing also a decretal of Innocent II.

282 Cod. 7.69.1. See Kaser, *Zivilprozeßrecht*, 619 and n. 17.

283 On *consultatio*, Berger, *Encyclopedic Dictionary*, 412. It was originally made to the emperor, on which see Litewski, *Zivilprozeß*, 69, 561–62, also discussing its medieval meaning, and 508 and n. 254, that *consultatio* is mistakenly seen as a type of appeal, a view found also in the *De edendo*. Episcopal consultations were essential to development of canon law, especially under the impact of papal decretals, during the twelfth century, on which see Anne J. Duggan, "De consultationibus: The Role of Episcopal Consultation in the Shaping of Canon Law in the Twelfth Century," in *Bishops, Texts and the Use of Canon Law*, 191–214.

and fourth generally having thirty days.²⁸⁴ If the one who had appealed should die during the fourth period of deadline, the period of three months was restored by the prince.²⁸⁵ Thus, a year suffices for examining and concluding a consultation. However, this matter is better provided for by a new constitution:²⁸⁶ a year is granted the one making the appeal within which he may pursue a suit either by himself or jointly; or if just cause should intervene, another year is granted. If that year has passed and the case is still not decided, the sentence stands as valid with no further appeal possible. When a month from the biennium remains, the winning party is allowed to come to court in order to question the defendant; whether the defendant is found or not, let the winning party assert his allegations,²⁸⁷ so that the sentence may be confirmed or rescinded and, in every case, with the absent party condemned to pay expenses.²⁸⁸ If neither comes, the sentence stands after the second deadline has passed.²⁸⁹

§If a sentence made in Egypt or in both provinces of Libya concerning the sum of ten pounds of gold is appealed, the new constitution decrees that the appeal not come to the royal city but, instead, to the Augustal prefect (Prefect of Egypt). There will be no subsequent appeal. If in the dioceses of Asia or Pontus, then it should be made similarly without hope of appeal to the *Spectabiles*, counts, proconsuls, praetors and governors, men compelled only by fear of God and the laws. In the East, the Count of the East shall decide without appeal about a sentence concerning, again, ten pounds. However, appeals are not directed against one *Spectabilis* to another but to the Prefect, the *Illustris*,²⁹⁰ who shall examine with

284 Cod. 7.63.5.1a, comparing also Cod. 7.63.2pr and Cod. 7.62.24. In general, Kaser, *Zivilprozeßrecht*, 620.

285 Cod. 7.63.2.1 and Cod. 7.63.2.2.

286 Nov. 49.1. For the classical law, Kaser, *Zivilprozeßrecht*, 621.

287 On *allegatio* and *allegare*, Nörr, *Zur Stellung*, 24 and n. 36, also André Gouron, "Utriusque partis allegationibus auditis," in *Justice et justiciables. Mélanges Henri Vidal* (Montpellier: Faculté de droit, d'économie et de gestion de Montpellier 1994), 35–45, rp. in *Juristes et droits savants*, cap. xvi.

288 On the *expensae litis*, Litewski, *Zivilprozeß*, 569 and n. 1, comparing also the *De edendo* and *Ordo Bambergensis*, cap. iv.

289 Nov. 49.1.

290 The *Illustres* were high-ranking officials in Late Antiquity, on which see above, also Berger, *Encyclopedic Dictionary*, 491, also Jolowicz, *Historical Introduction*, 442, 444–45. See chapter 5 for the *Ordo Bambergensis*' (cap. vi) treatment of the *illustres*. The *Spectabiles* ranked beneath the *Illustres*, Berger, *Encyclopedic Dictionary*, 721 and Litewski, *Zivilprozeß*, 95.

the supreme *Quaestor*. The highest appeal about the sentence concerning the same sum of ten pounds of gold, if given by those presiding or other judges delegated by the prince, provided they are not *Spectabiles*, is referred to the *Spectabiles*. By ancient custom, *Illustres* refer appeals to competent judges,²⁹¹ which is evident from that constitution.²⁹² Finally, if the appeal was made from the delegated judge, he who had delegated shall judge it.²⁹³

§After the appeal has been legally made, both the appellant and the winner of the case shall be allowed to introduce new allegations into judgment and to renew the case completely.²⁹⁴ The license of appealing is open to nearly everyone. Murderers, poisoners, adulterers, and also those who committed manifest violence, convicted by legal arguments, overcome by witnesses, confessed by their own voice of vices and evils, are not permitted to appeal.²⁹⁵ Those in contempt are in the same condition who, having been called by three edicts or,²⁹⁶ in place of the three, one, called the peremptory edict,²⁹⁷ refuse to appear. For he who does not submit to the one declaring the law shall be compelled by the loss of the trial.²⁹⁸ He does not suffer contempt who defends himself with the excuse of poor health or involvement in a greater case.²⁹⁹ But there is no appeal from execution unless the executor should exceed the legal rule.³⁰⁰ Sometimes an appeal legally made afterwards disappears, as when one condemned according to legal procedure appeals, but then dies, and the crime is extinguished by death.³⁰¹

291 Litewski, *Zivilprozeß*, 114 n. 535.

292 Nov. 23.3–4. In general, Kaser, *Zivilprozeßrecht*, 535–36.

293 On the classical procedure of delegation, George Mousourakis, *A Legal History of Rome* (New York: Routledge, 2007), 129. This also interests the *Ordo Bambergensis*, on which see Litewski, *Zivilprozeß*, 517 and chapter 5 below.

294 Litewski, *Zivilprozeß*, 519 and n. 404.

295 Cod. 7.65.2pr. Writing some decades prior to Bulgarus, Bernold of Constance also had shared this concern, as noted by Fried, “Die römische Kurie,” 160.

296 Nörr, *Prozessrecht*, 76–77. See also below in chapter 3 for more extensive treatment by the *De edendo*.

297 Dig. 42.1.53.1 On this text, Kaser, *Zivilprozeßrecht*, 478 n. 60, also Nörr, *Prozessrecht*, 71, 74–75 and Litewski, *Zivilprozeß*, 282, comparing here both the *De edendo* and *Ordo Bambergensis*, cap. iii.

298 Dig. 42.1.53pr. See Kaser, *Zivilprozeßrecht*, 479 n. 66.

299 Dig. 42.1.53.2. On this text, Kaser, *Zivilprozeßrecht*, 480 n. 80.

300 Cod. Th. 11.36.25. See Kaser, *Zivilprozeßrecht*, 623 n. 3, 626 n. 26, also Litewski, *Zivilprozeß*, 540 n. 26 on the executor, with reference also to the *De edendo*. See chapter 3.

301 Compare Cod. 9.6.3.

§Sometimes the appeal ceases because of the matter itself, sometimes on account of the person.³⁰² In the former, it happens because the sentence was given against the law either by a bribe or since the man was called to the rank of *duumvir*, about whom it had been uncertain through his appeal whether he was, instead, legally called to the rank of decurion,³⁰³ or because it was decreed in momentary possession.³⁰⁴ It ceases concerning the person when he was elected a magistrate,³⁰⁵ or if he was either convicted of a crime or had confessed,³⁰⁶ or was held in contempt or even that the praetorian prefect had judged the case.³⁰⁷

§If moved by bribe or favoritism, a judge has judged badly.³⁰⁸ He shall not only suffer a significant diminution of esteem and reputation but also the loss of the trial.³⁰⁹ If he judged ignorantly or impudently,³¹⁰ he shall be condemned to the extent as seems equitable to the one deciding.³¹¹

302 This distinction is not made by the other *ordines* in this study, on which see Litewski, *Zivilprozeß*, 512–13.

303 Cod. 7.64.3.

304 See above, Cod. 7.69.1.

305 On *designatus*, elected as a magistrate, Berger, *Encyclopedic Dictionary*, 433. Discussing the legal status of magistrates in the classical law, E.J. Weinrib, “The Prosecution of Roman Magistrates,” *Phoenix* 22.1 (1968): 32–56.

306 Compare Cod. 7.65.8. On this text, Kaser, *Zivilprozeßrecht*, 619 n. 9.

307 Cod. 7.62.19pr. On this text, Kaser, *Zivilprozeßrecht*, 535–36.

308 Litewski, *Zivilprozeß*, 473 n. 334, comparing also *Ordo Bambergensis*, cap. xvii, xxi, which consider, in light of canon law, if this might be simony. There is treatment there concerning *iudex qui litem suam facit*. See chapter 5. Judicial misconduct will also be treated by the *De edendo* in the next chapter. For a thorough treatment of the relevant, classical civil law on judicial misconduct, Ernest Metzger, “Absent Parties and Bloody-Minded Judges,” in *Mapping the Law. Essays in Memory of Peter Birks*, ed. Andrew Burrows and Lord Rodger of Earlsferry (Oxford: Oxford University Press, 2006), 455–76, also David Ibbetson, “The Misbehaving Judge. Two Footnotes,” in *Ius Romanum-Ius Commune-Ius Hodiernum. Studies in Honour of Eltjo J.H. Schrage on the Occasion of his 65th Birthday*, ed. Harry Dondorp, et al. (Amsterdam and Aalen: Scientia Verlag, 2010), 209–24.

309 Cod. 7.49.2, also Cod. Th. 1.16.6 and, in general, Brundage, *Medieval Origins*, 388–90, though without reference to the *ordines*, and R.H. Helmholz, “Money and Judges in the Law of the Medieval Church,” *The University of Chicago Law School Roundtable* 8.2 (2001): 309–23 discussing not only the canon law’s view on money and the possibility of judicial bribery but also criticism, for example from John of Salisbury. See also Pennington, “Practical Use,” 23 for this text in a decretal of Pope Innocent II, *Tunc pax et caritas*, PL 179.226, and Litewski, *Zivilprozeß*, 128 n. 739, comparing the *Ordo Bambergensis*, cap. xvii.

310 Litewski, *Zivilprozeß*, 126 n. 726, also 129 n. 743, comparing the *Ordo Bambergensis*, cap. xvii.

311 Litewski, *Zivilprozeß*, 126 n. 727, again comparing the *Ordo Bambergensis*, cap. xvii, also Pennington, “The Practical Use of Roman Law,” 18.

The Rules of Law

Here begin the comments on legal rules which Bulgarus, the jurist, declared to the chancery.

§Following your advice, we decided to follow the best order through the remaining items. There is clearly the opportunity, as time permits, to offer some remarks concerning the rules of law. In this matter, I ask that I may appear at least to fulfil the tribute of friendship, if not satisfy the duty of teaching.

§Therefore, a rule is what briefly treats the legal matter at hand. Law is not derived from the rule but, instead, the rule comes from the law.³¹² Individual laws were first declared and then, after these, a rule, like a certain conjunction of individual things, set down. An example is ‘with the plaintiff not proving his case, the one who was accused wins;’ (another) ‘There is, by the nature of things, no proof by negation.’³¹³ Opposed to these is another: ‘Lack of proof is decided by oath.’³¹⁴ Sometimes on behalf of the plaintiff, not for the defendant, it happens that the plaintiff, who did not prove his case since he lacked both witnesses and documents, is nevertheless able to prevail by swearing an oath; thus the case was heard and decided on the basis of an oath and, through this, the plaintiff,³¹⁵ not completely lacking proof, gains trust from the judge by swearing. Certainly, the oath is not said to be the same as proof. Equally, the defendant may sometimes swear an oath though, in the natural course of proceedings, he is not compelled to prove; yet he may swear if he not only does not deny, but also affirms, the plaintiff’s charge. This is as if he denies the amount but affirms that his surety was discharged on account of a base reason. He is then admitted to giving proof. Does anyone wonder that the defendant ought to swear an oath when it seems that another ought to prove his charge?

312 In general, Bruno Schmidlin, “Regula iuris: Standard, Norm oder Spruchregel? Zum hermeneutischen Problem des Regelverständnisses,” in *Festschrift für Max Kaser*, 91–110, especially 104–05 for this maxim, found at Dig. 50.17.1: *Non ex regula ius sumatur, sed ex iure quod est regula fiat*.

313 Cod. 4.19.23. In general, Yves Mauten, “Per rerum naturam factum negantis probatio nulla sit. Le Problème de la preuve négative chez les glossateurs,” in *Mélanges Anne Lefebvre-Teillard*, 695–706.

314 Litewski, *Zivilprozeß*, 430 and n. 1099.

315 On Bulgarus here, Litewski, *Zivilprozeß*, 430 and n. 1104, comparing also *De edendo* and the *Ordo Bambergensis*, cap. xx, on which see chapter 5. The lack of evidence was a common explanation given by the *ordines* for the oath.

§What is not someone's property is granted to the possessor.³¹⁶ But divine things and those sacred and holy to religion are in no one's possession.³¹⁷ Thus, I would say they are reckoned to the patrimony of men by the constitution of God, for *nullius* is placed differently in the major and minor premises. Indeed, in the major premise it excludes men, and God in the minor premise:³¹⁸ yet the syllogism does not include men. If you say that heritable properties not yet added in inheritance are no one's particular property by either the judgment of God or man and seem ought to be granted to the one possessing them, then authority ought to respond that they are heritable and thus in the possession of the deceased. What about the free man? Is it not granted to the one possessing since no one has possession.³¹⁹ However, a rule declares about these things: those things naturally suitable are for man's use and for his gain or patrimony. For man is born to occupy, not to be occupied and to do whatever he wills and not to be a slave. That sometimes a man is a slave, I said, is not natural but, instead, a result of evil and invasion, since all men are by nature free.³²⁰

§Four ecclesiastical councils obtain the force of law, and those same councils prohibit usury, as do any number of laws;³²¹ yet the laws also urge usury from many and necessary reasons. I respond that what was accepted by those laws was not legally against other laws. When something is done against the law, the law itself judges it as corrupt.³²² But homicide and theft are against the laws and are nevertheless not

316 Inst. 2.1. On this passage in Bulgarus, Meyer, *Distinktionsverfahren*, 95.

317 Inst. 2.1. Compare also Dig. 1.8.1pr.

318 Meyer, *Distinktionsverfahren*, 95 and n. 156.

319 The text reads *Quia nullius in bonis est?*

320 Not every commentator, whether civilian or canonist, agreed. See Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Munich: Hüber, 1967), 4 for the civil law's argument for slavery as a natural condition which, in his view, delayed legal and social progress. See also Norbert Brieskorn, "Die Rechtsinstitution der Sklaverei in der Beurteilung der spätmittelalterlichen und frühneuzeitlichen Kanonistik," in *Proceedings Catania*, 715–31 and André Gouron, "Liberté, servage, et glossateurs," *Recueil de mémoires et travaux publiés par la Société d'histoire du droit et des institutions des anciens pays de droit écrit* 11, (1980): 41–51, rp. with same pagination in *La science du droit dans le Midi de la France au Moyen Age* (London: Variorum, 1984), chapter xvi.

321 Cod. 1.1.8.19. Compare also a letter of Gregory the Great preserved at D 15 c. 2.

322 For a very similar passage in the *Ednodationes* of Rogerius on the *Codex*, Kantorowicz, *Studies*, 289.9–10.

neglected as if merely corrupt matters, but are more strongly punished. I respond: What has the effect of law, like a contract or pact, is considered corrupt if done illegally, (for example if) the son illegally receives loaned money³²³ or a woman assumes an obligation against the law.³²⁴ Yet these were not rendered void by the law itself but were repelled by means of an exception.³²⁵ I respond: according to the intention of the one establishing the law, certain things are thus prohibited so that they may not be valid by reason of the law itself as, for example, marriages with a godmother or sister.³²⁶ Certain things are rendered void only according to effect, as the councils mentioned above. When loans have been given, they neither fully support, nor entirely oppose, the claim for money and obligation. It is the same in stipulation,³²⁷ where one is obligated to another. For since one opposed the law thus, with the penalty following upon his own person, the action then becomes valid.³²⁸

§Concerning donation made between the husband and wife,³²⁹ the rule of law states that it becomes valid in those cases. It is the same with a donation made by the father to his children.³³⁰ Therefore, things always prohibited,³³¹ like marriage with one's mother, are neither valid nor become valid with time. For those whose reason for prohibition is not perpetual, they may not at present obtain, yet may become valid in the future, for example marriages which a governor could condemn in his own province but, later, when his magistracy has been given up, could then be legal, though formerly invalid.³³² Another rule follows: when something was done against the law, those things that either come from it or later

323 A reference to the *Senatusconsultus Macedonianum*, on which see Berger, *Encyclopedic Dictionary*, 698. This forbade loans to the *filiusfamilias*.

324 *Muliere contra ius intercedit*. On *intercedere*, Berger, *Encyclopedic Dictionary*, 506.

325 ...*sed exceptione elidenda*. On *elidere* in this context, Berger, *Encyclopedic Dictionary*, 451.

326 On forbidden marriages in the Roman law, Robinson, *The Criminal Law*, 56–57; for prohibition of marriage with godparents in the canon law, something declared as early as the eighth century, Brundage, *Law, Sex, and Christian Society*, 141.

327 On *stipulatio*, see below.

328 The term is *convalescere*, describing an action whose validity was initially uncertain gaining validity. See Berger, *Encyclopedic Dictionary*, 415.

329 On this form of gift, Berger, *Encyclopedic Dictionary*, 43.

330 Berger, *Encyclopedic Dictionary*, 734 on the *testamentum parentis inter liberos*.

331 Literally, “those which perpetually preserve the reason of prohibition.”

332 Wahrmond notes Cod. 5.2.1.

result, for example a transfer of ownership³³³ or pledge,³³⁴ are also void. It is found contrary to these in the alienation of minors' estates which cannot be alienated without the decree by the seller.³³⁵ Nevertheless, the substitution of pledges which the curator³³⁶ obligated for eviction holds.³³⁷ I respond: certain things have been prohibited, not to the extent that they might not obtain in some way, for example a loan given to the son. Otherwise, they are invalid until, when the reason for their prohibition is removed, they become valid. Just as we say about marriages before the governor, does anyone object that results are valid when the principal reasons themselves are bereft of force? There is another opposition to the same rule.³³⁸ Every (act of) turpitude is against the laws.³³⁹ Therefore, a transference is not valid as if it does not transfer legal ownership.³⁴⁰ It is turpitude, for example, if someone did not return my property lent to him without paying. For this, I accordingly claim an action to recover money.³⁴¹ However, no one brings a suit alleging a debt to a property he already owns. It is asked: do I cease to be the owner through that transfer? I respond: if there is turpitude in the transfer, just as in this way if he restored the lent property to you. Then, since the property belongs to

333 *Traditio*, on which see Berger, *Encyclopedic Dictionary*, 739.

334 For *pignus*, Berger, *Encyclopedic Dictionary*, 630.

335 On the alienation of minors' properties, compare Cod. 5.71.7.

336 On the *curator minoris*, Berger, *Encyclopedic Dictionary*, 421.

337 On *evictio*, Berger, *Encyclopedic Dictionary*, 457 where someone was evicted from a property sold to him by one who did not own it.

338 On the civil law treated in the following section, the question of turpitude being attached to the giver or receiver of a property and the available actions to a plaintiff, Patrick Mac Chombaich Colquhoun, *A Summary of the Civil Law*, (London: V. and R. Stevens and Sons, 1854), 280 and, more recently, Antonie Meyer-Spasche, *The Recovery of Benefits Conferred under Illegal or Immoral Transactions. A Historical and Comparative Study with particular emphasis on the Law of Unjustified Enrichment* (unpublished Ph.D. thesis, University of Aberdeen, 2002) without, however, discussing Bulgarus here.

339 On *turpitude*, Berger, *Encyclopedic Dictionary*, 746–47.

340 On *dominium* and *traditio*, Berger, *Encyclopedic Dictionary*, 441–42 and 739. See also above concerning the *donatio inter virum et uxorem*.

341 On the *condictio ob turpem causam*, Berger, *Encyclopedic Dictionary*, 405–06 and, generally, Cod. 4.7. For brief discussion of the classical law, Nicholas, *An Introduction*, 230 and Jolowicz, *Historical Introduction*, 217–19, noting that *condictio* is a suit alleging a debt according to the civil law. *Conditiones* became increasingly common in litigation during the second half of the twelfth century, for example at Pisa, on which see Wickham, *Courts and Conflict*, 121–22.

you, there is no transfer nor does ownership transfer.³⁴² If I transfer however before the magistrate, though for the sake of an illegal thing,³⁴³ ownership does transfer. Equity counsels reclaiming by claiming an action for recovery.³⁴⁴ It is the same in stipulation:³⁴⁵ if turpitude is present through the joinder of condition, the stipulation does not legally hold.³⁴⁶ If, however, it were done without condition, but for the sake of an illegal thing, the stipulation indeed holds. Here, however, one is helped by equity through an exception, since what took place occurs not with the donation made by the parent. When, for example, the father donated, as it were, to the son outside the household,³⁴⁷ the donation obtained from the beginning. However, if it is being donated as if to the son with pure intention, as it were paternal goods owed the quasi-son, then it neither holds from the beginning nor afterwards is regarded as such, but the donation is equally divided among the heirs, as I find stated concerning combining possessions.³⁴⁸ However, if he donates to the son as his son,³⁴⁹ nevertheless he thinks about succession, and it is an act of this kind, as if he donated by means of a living trust (*inter vivos*).³⁵⁰ This intention does not vary from the highest judgment and thus it is understood by the law of legacy, provided that the will is proved unchanged, as found in the (*Digest's*) title concerning co-heirs dividing common property.³⁵¹

342 In general, Jolowicz, *Historical Introduction*, 296–97 and Nicholas, *An Introduction*, 118–19.

343 On *res turpis*, compare Dig. 17.1.6.3.

344 On *repetitio*, Berger, *Encyclopedic Dictionary*, 675. Dig. 12.5.1.2. Other *ordines* in this study will also consider *repetitio*, for example the *Ordo Bambergensis*.

345 On *stipulatio*, generally, Jolowicz, *Historical Introduction*, 389; also, treating the classical law and comparing with *pacta*, Rolf Knütel, “Stipulatio und Pacta,” in *Festschrift Max Kaser*, 201–28. Both the *De edendo* and the *Ordo Bambergensis* will treat stipulation at some length.

346 Meyer-Spasche, *The Recovery of Benefits*, 4.1, noting Dig. 12.5.8.

347 On *extraneus heres*, Berger, *Encyclopedic Dictionary*, 466 and Jolowicz, *Historical Introduction*, 258. Such issues were hardly new, on which see Peter Landau, “Ludwig der Fromme als Gesetzgeber. Das Gesetzgebungsprogramm des Kaisers am Beispiel von Verwandtenerbrecht und Verfügungsmacht,” in *Festschrift für Gerd Kleinheyer zum 70. Geburtstag*, ed. Franz Dorn, Jan Schröder, (Heidelberg: C.F. Müller, 2001), 371–86.

348 Combining possessions is *collatio*. On *collatio donationis*, Berger, *Encyclopedic Dictionary*, 395. In general, Dig. 37.6.1pr. I thank Dr. Bauer for her insights here.

349 See above in the discussion of *regulae iuris*.

350 Berger, *Encyclopedic Dictionary*, 443, the donation made when both donator and donee are alive. See Dig. 39.6.27 also the *Ordo Bambergensis* in chapter 5.

351 On the *familiae (h)eriscundae*, Berger, *Encyclopedic Dictionary*, 343; Dig. 10.2.18.2. For further treatment by Bulgarus, see the *Opusculum* edited by Kantorowicz, *Studies*, 250.4–14.

§Women can neither be judges nor bring claims for others,³⁵² but can only claim for themselves.³⁵³ They cannot intervene on another's behalf save when they are conducting their own business, nor can they intercede on behalf of their creditor or litigate for their own guardian save when the case has been recognized on behalf of the parent, for here they rightly assume another obligation.³⁵⁴ He who can consent is able (also) to refuse.³⁵⁵ If I shall have been undertaking a matter on behalf of a youth, even though he opposed it, nevertheless I hold him under obligation since his opposition did not legally suffice. For it is presumed that he neither wished that I bring an *actio mandati*,³⁵⁶ nor desired that this suit be withdrawn.³⁵⁷ It is not presumed that he assents who submits to the legal authority of the father or lord.³⁵⁸ If a son, though compelled, took a wife, it nevertheless appears he had chosen and, through his act, assented. However, if he were compelled to take an inheritance and, afterwards, repudiated it, he shall suffer no disadvantage for he had never wanted it. It is similar for a slave compelled to commit an offense, who would have perished if he had not obeyed. He should suffer no loss for he had not wished to do this. However, it is not the same with more serious offenses. Our law does not permit the man who has died to be able to leave his property from the beginning partly by testament and partly intestate,³⁵⁹ unless he is a soldier able to make a testament only limited to things during military service,³⁶⁰ which could be said about items, if

352 Dig. 50.17.2pr. For a concise treatment of women's status in the classical law, see the essay in the *Forum Historiae Iuris* by Birgit Feldner, "Women's Exclusion from the Roman *Officium*," accessed at <http://fhi.rg.mpg.de/articles/0209feldner.htm> on 22 November 2013.

353 Litewski, *Zivilprozeß*, 154 and n. 133, a point not made by the other *ordines*.

354 *nam aliud mandatum recte suscipiunt*: See Berger, *Encyclopedic Dictionary*, 726.

355 Dig. 50.17.3.

356 On the *actio mandati*, the mandator's action against the mandatary, Berger, *Encyclopedic Dictionary*, 574. Compare Dig. 50.17.60. On varying forms of the *actio mandati* in the classical law, Mac Chombaich Colquhoun, *A Summary*, 91.

357 The phrase is *nec velle creditur, ut actione destituatur*. On *destituere actione*, to renounce, Berger, *Encyclopedic Dictionary*, 433.

358 Dig. 50.17.4.

359 Dig. 50.17.7. On this maxim, Berger, *Encyclopedic Dictionary*, 595.

360 Compare Cod. 3.28.37.1d. On the *querela inofficiosi testamenti* and the *libellus conventionalis*, though not considering Bulgarus here, Wieslaw Litewski, "Mündliche Klage und Klageschrift in den ältesten ordines iudiciarii," in *Wirkungen europäischer Rechtskultur. Festschrift für Karl Kroeschell zum 70. Geburtstag*, ed. Gerhard Köbler and Hermann Nehlsen (Munich: Beck, 1997), 684–85. See also the following note.

they are found to be legally his, or not, if recognized as being in the power of another. Although thus deprived of half of the estate he granted in testament, he arranged for the entire estate to be divided in half. But he who made a testament at the very beginning afterwards becomes intestate when an heir, having been appointed by the intercession of others, defeats another by means of the complaint of unjust disinheritance, and the one having lost the case then died.³⁶¹

§In obscure matters we follow the least punishment.³⁶² If a judge has issued a interlocutory decree that I had done violence,³⁶³ since perhaps either public or private violence is being claimed against me in court, the charge of lesser violence, that is, the private, shall be pursued.³⁶⁴ Thus, if three judges judged,³⁶⁵ and one sentenced to 15, another to 10, and the last to 5, we follow the least sum of 5. 'Neither by praetorian right nor solemn law, that is the civil law, is anything changed by private agreement.'³⁶⁶ For the successor freed from his pact by civil law or praetorian right shall not be prohibited from succession, just as the one to whom the suit of manifest theft granted by praetorian right,³⁶⁷ not of manifest theft, from the civil law,³⁶⁸ not to sue from the praetorian right did not alienate himself from the suit if, nevertheless, he renounced the corresponding action or if he freed the adversary, as a thief, or reduced the exception.

§What was legally defective from the beginning cannot become valid with the passage of time,³⁶⁹ for example, a legacy left to the slave of the heir.³⁷⁰ Though subsequently manumitted by the living testator,

361 On the *querela inoffici testamenti*, the complaint made by an heir who would legally inherit in intestacy, Berger, *Encyclopedic Dictionary*, 665. On the differing opinions of Bulgarus and Martinus, Kantorowicz, *Studies*, 200, 210–11 and, on the two doctors in general, Marie Theres Fögen, "Learned Law and the Desire of Politics. Barbarossa Meets Bulgarus and Martinus," in *Law and Learning*, 29–40 and Aserci, *The Laws*, 223.

362 Dig. 50.17.9.

363 Discussing the distinction between interlocutory and final judgments already made in late antiquity, see Mousourakis, *Historical and Institutional*, 371.

364 On greater and lesser violence, *vis maior* and *minor*, Berger, *Encyclopedic Dictionary*, 769.

365 On this number of judges, Litewiski, *Zivilprozeß*, 84 n. 92, also the *De edendo*.

366 Dig. 50.17.27.

367 On *furtum manifestum*, the thief caught in the act, Berger, *Encyclopedic Dictionary*, 480–81.

368 On *furtum non manifestum*, Berger, *Encyclopedic Dictionary*, 481.

369 Dig. 50.17.29. On this maxim in relation to Roman testamentary law, the focus of Bulgarus in his treatment of *regulae iuris*. Buckland, *A Text-Book*, 345.

370 On legacies to slaves, Buckland, *A Text-Book*, 342.

and the testator then died without changing his will, the slave still does not gain the legacy. For what was defective from the beginning does not become valid with the passage of time. It is otherwise in contracts, with another's property bound by security or illegally distrained from the start,³⁷¹ with *usucapiones*³⁷² or prescriptions, sale or pledging to a creditor becoming valid over time.³⁷³

371 On *obligare rem*, Berger, *Encyclopedic Dictionary*, 603.

372 There is no really suitable English equivalent for *usucapio*, gaining ownership of another's property by possession. See Berger, *Encyclopedic Dictionary*, 752.

373 On *pignoratío*, Berger, *Encyclopedic Dictionary*, 630. For *pignus* and other forms of pledging and security in the classical and medieval civil law, Paul J. du Plessis, "Towards the Medieval Law of Hypothec," in *The Creation of the Ius Commune*, 159–74 and for later use of the *actio hypothecaria* in twelfth-century Pisa, Wickham, *Courts and Conflict*, 126.

The Anglo-Norman *Ordo iudiciarius*: Pseudo-Ulpianus, *De edendo*

The influence of the revived civil law on the church was gradual.¹ Yet, change was underway, even if many in the ecclesiastical hierarchy were evidently uncomfortable with the obvious professional, and lucrative, attractions of legal study. Church councils, for example Lateran II (1139), issued degrees prohibiting study of the civil law.² Such prohibitions had little effect. The church needed lawyers.³ The two laws, civil and canon, despite rivalry between their practitioners, could not exist in isolation from each other.⁴ The civil law, now revealed in all its richness and complexity, demanded assimilation and application to the ecclesiastical court.⁵ Procedure was vitally important.⁶ This chapter treats an early response to the challenges confronting jurists striving to craft a legal procedure grounded in the civil law and adaptable to the canon: the Pseudo-Ulpianus, *De edendo*.

At about the same time Hariulf travelled to Rome, the first recension of the *Decretum Gratiani* was in circulation.⁷ Sometime around 1140, a learned monk at Bologna undertook the formidable task of creating an encyclopedic

1 Among many studies, see Winroth, "The Teaching of Law," 55.

2 Brundage, *Medieval Origins*, 124–25, noting other twelfth-century complaints about clerical study of secular law.

3 For example, Lange and Kriechbaum, *Römisches Recht*, 100; on the maxim *civilista sine canonista parum valet, canonista sine civilista nihil*, and Cortese, "Theologie," 74. Compare also Giesela Drossbach, "Die Entwicklung des Kirchenrechts als raumübergreifendes Kommunikationsmodell im 12. Jahrhundert," in *Zentrum und Netzwerk. Kirchliche Kommunikationen und Raumstrukturen im Mittelalter*, ed. Giesela Drossbach et al. (Berlin and New York: Walter DeGruyter, 2008), 41–62, also Kurt Wolfgang Nörr, "Institutional Foundations of the New Jurisprudence," in *Renaissance and Renewal*, 324–38.

4 Helmholz, *The Canon Law*, 85–86.

5 See, for example, Pierre Legendre, *La Pénétration du droit romain dans le droit canonique classique de Gratien à Innocent IV (1140–1254)* (Paris: Imprimerie Jouve, 1964).

6 A point emphasized by Helmholz, *The Canon Law*, 312–13, also Schioppa, "Le Rôle," 360–61, treating the cases heard by papal judges delegate in the late 1140s.

7 Most recently, with review of scholarship, Witt, *Two Latin Cultures*, 246–51. Suggesting that the first recension may have even been composed as early as the 1120s, and thus contemporary with Innerius, Charles Donahue, jr. "A New Synthesis of the History of Canon Law in the Classical Period," *ZRG KA* 96 (2010): 613.

compilation of canon law derived from earlier collections, for example the Pseudo-Ivonian *Panormia*. Even in its first version, the *Decretum* was already a monumental reference and instructional work, a canonistic equivalent to the *Corpus iuris civilis*. Gratian arranged the canons into two main sections. *Distinctiones*, which covered discrete legal subjects, for example episcopal election. *Causae* were case studies. Among these was an extended treatment of penance, the *De penitentia*.⁸ *Causae* 2 and 13 were the principal, though not only, sections devoted to procedure.⁹

While the comparison with the *Corpus iuris civilis* is obvious, and apt, Gratian's *Decretum* also differed profoundly from the civil-law compilations in its method of organizing and interpreting the law. Gratian employed the dialectic, the scholastic method. Gratian organized texts, compared and contrasted them, and provided a running commentary, *dicta*. This commentary posed questions, summarized texts or blocks of texts, and attempted to harmonize apparent conflicts. Those who commented on his work would follow his method, if not always his arguments and conclusions.

The second, more common, version of the *Decretum* differs in several major ways from the first. It contains far more Roman law than found in the first recension.¹⁰ This would play an indispensable role in the development of canonistic procedure.¹¹ The second recension also adds the *De consecratione*, a section dedicated to liturgy and sacramental theology.

8 An excellent, recent study is provided by Atria Larson, *Master of Penance. Gratian and the Development of Penitential Thought and Law* (Washington, D.C.: The Catholic University of America Press, 2014).

9 Among many studies, Nörr, *Zur Stellung*, 4–5 and n. 10, also 36–37. See also Dominique Bauer, “On the Historical Genesis of Legal Proceduralism,” in *Ius Brabanticum, ius commune, ius gentium: Opstellen aangeboden aan prof. mr. J.P.A. Coopmans ter gelegenheid van zijn tachtigste verjaardag*. ed. E.J.M.F.C. Broers, B.C.M Jacobs, R.C.H. en Lesaffer (Nijmegen: Wolf, 2006), 215–18.

10 Fundamental are the pioneering researches by Winroth in *The Making of Gratian's Decretum*. Among many reactions to Winroth's argument, Titus Lenherr, “Die vier Fassungen von C 3 q. 1 d.p.c. im Decretum Gratiani. Zugleich ein Einblick in die neuste Diskussion um das Werden von Gratian's Dekret,” *AKKR* 169 (2000): 353–81.

11 Fowler-Magerl, *Ordo iudiciorum*, 11, also, with a brief survey, Nörr, *Zur Stellung*, 36–37. The paucity of civil law in the first recension of Gratian's *Decretum* plays a key role in Winroth's analysis. For a cautionary view on the beginnings of legal studies at Bologna, Charles Donahue, jr., reviewing Winroth's work in *Law and History Review* 25.2 (2007): 403. On the influence of the exegetical ‘School of Laon’ on Gratian, John Wei, “Gratian and the School of Laon,” *Traditio* 64 (2009): 279–322.

The commentators on Gratian, the decretists, wrote glosses and composed commentaries (*summae*). They are commonly divided into regional schools: Bolognese, French, German (Rhenish), and Anglo-Norman.¹² All treated process to varying degrees. For example, Paucapalea, the Bolognese author of the first *summa* on the *Decretum*, reminded his reader that God Himself had followed the judicial order when questioning Adam in the Garden of Eden.¹³ Stephen of Tournai's *Summa*, also influenced by Bologna, discussed various aspects of procedure, for example the need for valid witnesses and documentary evidence.¹⁴ Thereafter, decretist commentary grew in complexity and sophistication.¹⁵

While Paucapalea and Stephen of Tournai wrestled with theory, procedural practice was changing.¹⁶ As we saw in chapter one, criticism of the ordeal was

-
- 12 Fundamental is *The History of Medieval Canon Law in the Classical Period, 1140–1234. From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington (Washington, D.C.: Catholic University of America Press, 2008), which includes chapters devoted to the schools of decretist commentary.
 - 13 Kenneth Pennington, *The Prince and the Law 1200–1600. Sovereignty and Rights in the Western Legal Tradition*, (Berkeley and Los Angeles: University of California Press, 1993), 142–43. On Paucapalea, Pennington and Müller, “The Italian Decretists,” in *The History of Medieval Canon Law*, 129–31.
 - 14 *Summa* of Stephen of Tournai cited by Fowler-Magerl, *Ordo iudiciorum*, 27–28 and n. 76, at C 2 q. 2 *in manifestis*. See Pennington, *The Prince and the Law*, 14; on Stephen's *Summa*, Pennington and Müller, “The Italian Decretists,” in *The History of Medieval Canon Law*, 136–38. The edition remains *Die Summa über das Decretum Gratiani*, ed. Johann Friedrich von Schulte (Giessen, 1890, rp. Aalen: Scientia Verlag, 1965), though it should be cautioned that von Schulte left out passages taken from other decretists, for example Paucapalea. That documentary evidence would be especially important in disputes over testaments is emphasized by Helmholz, *The Canon Law*, 334. Arguing that Bulgarus may have taught Stephen, Witt, *Two Latin Cultures*, 343.
 - 15 A good example of this, a work connected to the schools of Paris but also dependent upon Stephen of Tournai, is the *Summa Elnonensis*, on which see Gérard Fransen, “Colligite Fragmenta: La *Summa Elnonensis*,” *Studia Gratiana* 13 (Bologna, 1967): 85–108 and Fowler-Magerl, *Ordo iudiciorum*, 26–27. Dating from before 111 Lateran, the *summa* concentrates on *Causa 2* and discusses at length issues such as infamy and excommunication.
 - 16 Fowler-Magerl, *Ordines*, 79–83. On the development of the *ordo iudiciarius* as an attempt to ‘protect churchmen from the inequities of the thug justice of the law courts,’ Hyams, “Due Process,” 69. There was also concern for internal order, and this was not confined to the secular church. The new religious orders, for example Cistercians, demanded that proper order and procedure, established in their statutes, be followed. See Mirko Breitenstein, “Gerechtigkeit als Leitidee und Ordnungsprinzip im frühen Zisterzienserorden,” *Analecta Cisterciensis* 60 (2010): 225–62, also Mirko Breitenstein and Gert Melville, “Gerechtigkeit als fundierendes Element des mittelalterlichen Mönchtums,” in *Bilder-Sachen-Mentalitäten*.

becoming louder.¹⁷ The caseload in the ecclesiastical court was rapidly increasing, as were the number of papal decretals. These often treated some jurisdictional or procedural matter. Whether seen by some as providing counsel or even resembling an imperial rescript, decretals established and extended the *ius novum*, the papal law.¹⁸ As cases under appeal became more numerous,¹⁹ there was increasing demand for judicial personnel. Papal judges-delegate were appointed to represent the curia.²⁰ When they arrived, they found archdeacons and their staff laboring to handle the flood of litigation.²¹ These men

Arbeitsfelder historischer Kulturwissenschaften. Wolfgang Brückner zum 80. Geburtstag, ed. Heidrun Alzhemer, et al. (Regensburg: Schnell and Steiner, 2010), 41–42.

- 17 In general, Bartlett, *Trial by Fire and Water* also Whitman, *The Origins of Reasonable Doubt*, chapter 3, and Finbarr McAuley, “Canon Law and the End of the Ordeal,” *Oxford Journal of Legal Studies* 26.3 (2006): 473–513 without, however, considering the *ordines*. For a close, regional study of this transitional period in procedure, Bruno Lemesle, “Premiers jalons et mise en place d’une procédure d’enquête dans la région angevine (xi^e–xiii^e siècle),” in *La preuve en justice de l’Antiquité à nos jours*, ed. Bruno Lemesle (Rennes: Presses universitaires de Rennes, 2003), 89, noting the lack of references to the ordeal in documents from Anjou after the middle of the twelfth century, also, his essay “Les enquêtes dans la région angevine,” emphasizing the growing use of episcopal inquests. These authors, however, do not consider the *ordines iudiciorum*.
- 18 Charles Duggan, “Decretal Collections from Gratian’s *Decretum* to the *Compilationes antiquae*: The Making of the New Case Law,” in *The History of Medieval Canon Law*, 246–92.
- 19 Emphasized by Fowler-Magerl, *Ordines*, 83.
- 20 In addition to Sayers, *Papal Judges Delegate*, Müller, *Päpstliche Delegationsgerichtsbarkeit*, Brundage, *Medieval Origins*, 135–37, Charles Duggan, “Papal Judges Delegate and the Making of the ‘New Law in the Twelfth Century,’” in *Cultures of Power. Lordship, Status, and Process in Twelfth-Century Europe*, ed. Thomas N. Bisson (Philadelphia: University of Pennsylvania Press, 1995), 172–99 and Peter Herde, “Zur päpstliche Delegationsgerichtsbarkeit im Mittelalter und in der frühen Neuzeit,” *ZRG KA* 88 (2002): 20–43, though without considering the *De edendo* or other *ordines* treated in this volume. For a detailed study of a delegated judge and his associates, Ludwig Falkenstein, “Radulf von Sarre als päpstlicher Delegat und seine Mitdelegaten,” in *Grundlagen des Rechts*, 301–32. That in Lucca, at least, perhaps because of closeness to Rome, papal judges-delegate ‘were far from authoritative’ and also that ‘the choice to go to Rome’ (to appeal) was far less regular and more a decision in negotiating one’s way in a dispute, Wickham, *Courts and Conflict*, 233.
- 21 Brundage, *Medieval Origins*, 149–50. For evidence of increasing participation in the episcopal court by priests and cathedral chapters, Joseph Avril, “La participation du clergé diocésain aux décisions épiscopales,” in *À Propos des actes d’évêques. Hommage à Lucie Fossier*, ed. Michel Parisse (Nancy: Presses Universitaires de Nancy, 1991), 251–63.

in particular, not jurists in Bologna or the members of the curia, were probably the intended readers of the *De edendo* and the remaining *ordines* in this study.²²

Scholars have long highlighted the importance of the Anglo-Norman realm in the development of the *ius novum*.²³ The pioneering studies by Walther Holtzmann and Charles Duggan revealed the genesis and development of decretal collections in this region, especially during the pontificate of Alexander III.²⁴ While decretal collections were not confined to England's

-
- 22 Fundamental is André Gouron, "Le rôle des maîtres français dans la renaissance juridique du xii^e siècle," *Comptes-rendus des séances de l'Académie des Inscriptions et Belles Lettres* 133.1 (1989): 198–207. Noting that the archdeacon's jurisdiction and the rural chapters were still relatively new phenomena in the mid-century English church, H.G. Richardson and G.O. Sayles, *Law and Legislation from Aethelberht to Magna Carta* (Edinburgh: University Press, 1966), 91.
- 23 Stephan Kuttner and Eleanor Rathbone, "Anglo-Norman canonists of the twelfth century: an introductory study," *Traditio* 7 (1949–1951), 279–358, rp. in his *Gratian and the Schools*, cap. viii. Among more recent studies, Rudolf Weigand, "Die anglo-normanische Kanonistik in den letzten Jahrzehnten des 12. Jahrhunderts," in *Proceedings Cambridge*, 249–63 and Peter Landau, "Walter von Coutances und die Anfänge der anglo-normannischen Rechtswissenschaft," in *Panta rei. Studi dedicati a Manlio Bellomo* ed. Orazio Condorelli, (Rome: Il Cigno, 2004), 183–204. Certainly, interest in procedural law was not confined to the orbit of England. Discussing legal study at Rheims in the same period, especially the civil law, the teaching of Alberic, and the important early *ordo*, *De rhetorica ecclesiastica*, Waclaw Uruszczak, "Alberic et l'enseignement du droit romain à Rheims au xii^e siècle," in *Confluence des droits savants*, 37–68.
- 24 Charles Duggan, *Twelfth-Century Decretal Collections and their Importance in English History* (London, 1963). See also his *Canon Law in Medieval England. The Becket Dispute and Decretal Collections*, (London: Athlone Press, 1982) and *Studies in the Collections of Twelfth-Century Decretals. From the Papers of the late Walther Holtzman*, edited, revised, and translated by Christopher and Mary Cheney, (Vatican City: Biblioteca Apostolica Vaticana, 1979). On Alexander's decretals in the 'new law,' Patrick Zutshi, "Petitioners, Popes, Proctors: The Development of Curial Institutions, c. 1150–1250," in *Pensiero e sperimentazioni istituzioni nella 'societas Christiana' (1046–1250)*, ed. Giancarlo Andenna (Milan: Vita e pensiero, 2007), 269–70, Knut Wolfgang Nörr, "Päpstliche Dekretalen und römisch-kanonischer Zivilprozeß," in *Studien zur europäischen Rechtsgeschichte*, ed. Walter Wilhelm (Frankfurt-am-Main: Klostermann, 1972), 53–65 and, Duggan, "Decretal Collections from Gratian's *Decretum*." All are indebted to Stephan Kuttner, *Repertorium der Kanonistik. (1140–1234). Prodromus corpus glossatorum* (Vatican City, 1937), also available in occasionally updated form at <http://faculty.cua.edu/pennington/biobibl.htm> accessed on 24 December 2013. It should be noted that Kuttner's *Repertorium* does not treat procedural texts.

orbit,²⁵ the kingdom, so marked by church-royal conflict, especially concerned Rome and thus merited more than its share of letters.²⁶ As the career of Gérard Pucelle demonstrates, clergy were eager to travel to the Continent to study the law.²⁷ Before we turn to the *De edendo*, it is accordingly worth considering evidence of their procedural knowledge and practice. In particular, one hopes to find early signs of influence from the civil law.²⁸

Anne Duggan has called attention to the 1164 Council of Northampton for the presence of technical terms from civilian procedure. The council marked a key moment in the controversy between Henry II and Archbishop Thomas Becket. It provides compelling evidence that clerics then in royal service were familiar with at least some terms from Roman procedure.²⁹ Summoned by royal writ, Becket had not responded.³⁰ The author of the process against the

-
- 25 Peter Landau, "Die Anfänge der Verbreitung des klassischen kanonischen Rechts in Deutschland im 12. Jahrhundert und im ersten Drittel des 13. Jahrhunderts," in *Chiesa diritto e ordinamento della 'societas Christiana' nei secoli XI e XII* (Milan: Vita e Pensiero, 1986), 272–97.
 - 26 For example the *Collectio Francofurtana*, on which see *Die Collectio Francofurtana: Eine französische Decretalensammlung. Analyse beruhend auf Vorarbeiten von Walther Holtzmann*, ed. Peter Landau and Gisela Drossbach (Vatican City: Biblioteca Apostolica Vaticana, 2007). For an earlier example of a legal dispute in England that came to the attention of Pope Eugenius III, the so-called 'Stechworth Case,' Stefan Hirschmann, "Der Fall Heinrichs von Ely (The Stechworth Case)—Zur Praxis päpstlicher Delegationsgerichtsbarkeit um die Mitte des 12. Jahrhunderts," *ZRG KA* 89 (2003): 612–18. See also Wickham, *Courts and Conflict*, 225, contrasting England with Italy, for example Tuscany, which despite being much closer to Rome had seemingly more procedural diversity with respect to the papacy. He notes that the courts did not 'defy' Rome; at the same time, their courts used Roman jurisdiction 'for identifiably different purposes.'
 - 27 Peter Landau, "Gérard Pucelle und die Dekretsumme *Reverentia sacrorum canonum*: Zur Kölner Kanonistik im 12. Jahrhundert," in *Mélanges Anne Lefebvre-Teillard*, 623–38, noting that Gérard also invoked the *ordo iudiciarius*. On the professional attractions of Bologna, where some English clerics, for example Richardus Anglicus, also later taught, Richardson and Sayles, *Law and Legislation*, 74–75.
 - 28 Other sources could be exploited, such as letters, as shown in chapter 1. On John of Salisbury's letters as evidence for the learned law, for example in appeals to Rome, see Maximilian Kerner, "Johannes von Salisbury und das gelehrte Recht," in *Proceedings Munich*, 507–21.
 - 29 Duggan, "Roman, Canon, and Common Law," 379–408. Compare also Fraher, "The Becket Dispute," 347–49, also Hudson, *Land, Law, and Lordship*, 123 on *adoptivus* in the Treaty of Westminster (1153). Hudson sees this as a conscious choice to use the Roman term, but not with any technical sense.
 - 30 On these charges, Duggan, "Roman, Canon, and Common Law," 380–81. Both the *De edendo* and the *Ordo Bambergensis* treat *conditio*, though neither discusses it as *certi*

absent archbishop correctly used both *certi conditione* and *actio tutelae* to charge him. Unlike the Roman curia described by Hariulf, it appears that at least some English clerics were ready for civil-law jurisprudence.³¹

Another potential source for ascertaining clerical legal knowledge and practice is the *acta*. These legal settlements by archbishops, bishops, and archbishops are often preserved in charters. Many survive only in later copies or as attested to by other documents. A considerable number are forgeries. Moreover, prior to the 1170s, explicit influence of the learned law in them is hard to trace.³² Only in the last quarter of the century, well after the composition of the *De edendo*, do we find more frequent, though even then never abundant, references to the technical vocabulary of Romano-canonical process.³³ Despite these reservations, it is still worth considering whether there might be some evidence of civilian procedure in earlier *acta* more contemporary with the *De edendo*.

Let us consider prescription. Despite the Marturi case, it would seem at first glance that this would trouble the ecclesiastical court. Indeed, one might expect the canon law to oppose any argument from it since, unlike custom, it went against the one who actually held, or claimed to hold, the right. To a canonist, prescription thus might seem to arise ‘out of a wrong.’³⁴ Canon law,

conditio, a claim for a specific amount of money (*certum*). The *Ordo Bambergensis* also considers *tutela*, on which see chapter 5.

- 31 Duggan, “Roman, Canon, and Common Law,” 394. On can also compare the Council of Northampton with a council two decades before. The Council of Sens was convened in 1141 to examine the teachings of Peter Abelard, who was eventually condemned. This council, while treating the right of appeal, lacks any trace of civilian influence. Instead, the ancient *denunciatio evangelica*, mentioned in the Introduction, was invoked. See Wim Verbaal, “The Council of Sens Reconsidered: Masters, Monks, or Judges,” *Church History* 74.3 (2005): 460–93.
- 32 Martin Brett, “The Bishop’s Charter and the Law in Twelfth-Century England,” in *Proceedings Esztergom*, 15, though not discussing prescription. For an introduction to the *acta*, Christopher N.L. Brooke, “English Episcopal *Acta* of the Twelfth and Thirteenth Centuries,” in *Medieval Ecclesiastical Studies in Honour of Dorothy M. Owen*, ed. M.J. Franklin and Christopher Harper-Bill (Woodbridge: Boydell, 1995), 41–56.
- 33 Brett, “Bishop’s Charter,” 13–15.
- 34 Richard H. Helmholz, “The Creation of a Canon Law of Prescription,” in *Prescriptive Formality and Normative Rationality in Modern Legal Systems. Festschrift for Robert S. Summers*, ed. Werner Krawietz, et al. (Berlin: Duncker and Humblot, 1994), 265–66. That *bona fides* was assumed, indeed required, by many commentators, see Gordley, “Good Faith,” 94–95. On expanded notion of prescription in the twelfth century, championed by Rogerius, where it was not seen as a delay but, instead, a term covering all sorts of

however, had accepted prescription long before Marturi.³⁵ Attached to the property were rights, whose loss or acquisition were vital to both ecclesiastical foundations and their patrons. A good example was the *ius patronatus*, advowson in the common law, which both churches and their noble patrons strove to remember and defend.³⁶ In short, whoever best, or perhaps better put, most persuasively, remembered the past, was best positioned to win his claim.³⁷ Given that the distinction between history and law was 'at the best of times blurred,'³⁸ prescription encompassed both. It was everywhere, even when not specifically invoked.³⁹

Given pressures to hold or reclaim land, tithes, and rights, any number of canonistic authorities, from conciliar *acta* to papal decretals, had pronounced on prescription.⁴⁰ Gathered into canonical collections,⁴¹ these texts found their way into Gratian at C 16 q. 3.⁴² After the middle of the twelfth century, canonists were also guided by civilian discussions, for example Rogerius' treatise which, as discussed below, may have been known to the author of the *De edendo*.⁴³

We also find Pope Alexander III treating prescription from time to time. Alexander established a forty-year period for ecclesiastical rights and properties,

exceptions, see Fowler-Magerl, *Ordo*, 8. Rogerius's *summa* on the *Codex* was composed at Montpellier in the 1160s; it was completed and extended by Placentinus.

35 See, for example, *Benedictus Levita* 1.388, <http://www.benedictus.mgh.de/haupt.htm> accessed on 14 July 2015. This forged capitulary not only declares the standard forty-year prescription for ecclesiastical property, but extends it to legacies and inheritance.

36 On *possessio* in the *ius patronatus*, though without discussing prescription, Peter Landau, *Jus Patronatus. Studien zur Entwicklung des Patronats im Dekretalenrecht und der Kanonistik des 12. und 13. Jahrhunderts* (Vienna: Böhlau Verlag, 1975), 17–18.

37 For a remarkable Italian example where some 106 witnesses in 1177 were interrogated about a dispute some five decades earlier, Wickham, *Courts and Conflict*, 286–91.

38 West, "Legal Culture," 369, also McKitterick, *History and Memory*, 255–56, the latter emphasizing the historical message of canonical collections. While these authors are treating the Carolingian period, their views on law, memory, and history apply equally well to the twelfth century.

39 Brand, "The Origins of the English Legal Profession," 32.

40 On Justinian's 100-year prescription for the Roman church, Kantorowicz, *The King's Two Bodies*, 180–81, also Wolfgang Kaiser, "Zur hundertjährigen Verjährung zugunsten der römischen Kirche," *ZRG KA* 116 (1999): 60–103.

41 See Kuttner and Rathbone, "Anglo-Norman Canonists," 345, 354–55 on Ivo of Chartres.

42 The decretists, notably Stephen of Tournai, discussed it in depth, emphasizing differences between civil and canon law.

43 *De diversis praescriptionibus*, PL 146.1485B–1504B, on which see, in general, Kantorowicz, *Studies*, 142–44.

thus distinguishing between canonistic and civilian prescription.⁴⁴ He prohibited its application to various claims, for example obedience to prelates, rights of episcopal visitation, and tithes during an episcopal vacancy.⁴⁵

There were various reasons why English litigants might claim prescription, or at least allude to it, in disputes over ecclesiastical property and rights.⁴⁶ Perhaps the lengthy anarchy under Stephen II contributed to such disputes.⁴⁷ Abbots were particularly pressed to regain lands seized or alienated during the anarchy.⁴⁸ While disputes over land itself were supposed to be heard by royal judges, tithes were a different matter, and conflict over these appears frequently in the *acta*. Another reason was the activity of the new religious orders, for example the Cistercians, whose foundations could disrupt longstanding rights claimed by older religious houses.⁴⁹ Finally, if less dramatically, there was the accelerating transition to the parochial system, combined with the transfer of foundations to the new orders, for example the Augustinian canons.⁵⁰

While the earliest *acta*, both authentic and spurious, never use *praescriptio*, they do employ phrases such as *quadraginta annis et amplius* or *triennem possessionem atque etiam ampliorem quietam et inconcussam*.⁵¹ These numbers unmistakably invoke prescription. Two early examples come from Hereford and Winchester. The first, from Bishop Robert of Bethune, announces a settlement in favor of Nicholas, the incumbent of Sutton, concerning moveable

44 For earlier canon law that followed thirty-year prescription, Kaiser, "Zur hundertjährigen Verjährung," 97–98, with examples from the Carolingian period.

45 Helmholz, "Canon Law of Prescription," 273, noting that, a forty-year prescription 'was not unknown in Roman law.' Alexander, however, clearly decided to differentiate canonistic norms from what had been preserved by Gratian. For more extended treatment of prescription, Helmholz, *The Spirit*, chapter 7.

46 Hudson, *Land, Law, and Lordship*, 180–81.

47 In general, R.H.C. Davis, *King Stephen*, 3rd ed. (Harlow: Longman, 1990).

48 Kevin Shirley, *The Secular Jurisdiction of Monasteries in Anglo-Norman and Angevin England* (Rochester: Boydell and Brewer, 2004), 22–23.

49 In general, though without discussing prescription, Lars-Arne Dannenberg, *Das Recht der Religiösen in der Kanonistik des 12. und 13. Jahrhunderts* (Münster, Hamburg, London: LIT Verlag, 2007). Disputes over burial rights were particularly common, on which see Antoine Bernard, *La sépulture en droit canonique du décret de Gratien au Concile de Trente* (Paris: Les Editions Domat-Montchrestien, 1933) and, most recently, Brasington, "Disputing the Dead." See also, in general, C 13 q. 12, for *sepultura* disputes between secular and regular clergy.

50 Among many studies, Colin Platt, *The Parish Churches of Medieval England* (Avon: Secker and Warburg, 1981), 9–10.

51 Respectively 'forty years and more' and 'thirty-year possession.' Compare also chapter one, when Ivo of Chartres referred to an uninterrupted possession of forty-five years.

property pertaining to disputed land.⁵² Nicholas won his claim on the basis of thirty years' uninterrupted possession. Prescription may also be implicit in the Winchester act. Issued by Bishop Henry of Blois, also possibly prior to the reign of Alexander III,⁵³ it is addressed to Southwark priory. The act confirms the grant of the church of Banstead in Surrey made in the days of Bishop Giffard some forty years earlier. The canons had held Banstead without challenge. (*calumnia*). Again, the duration evokes prescription.

Other implicit references to prescription in authentic *acta* begin with the pontificate of Alexander III, the time of the *De edendo's* composition and reception. In 1177, Archbishop Richard of Canterbury rejected the claims of the nuns of Elstow to the church of East Haltom because they had failed to possess the church for forty years without challenge.⁵⁴ Ruling in favor of the canons of Newhouse, the archbishop warned the nuns not to trouble the canons further. In 1164–1165, Bishop Nigel of Ely informs both Bishop Robert of Hereford and Bishop Roger of Worcester about the settlement concerning the church of Gamlingay. Robert and Roger were trying the claim of St. Botolph's of Colchester to the church. A challenge had been made that the thirty-year possession had been interrupted; testimony, however, then had been offered by older witnesses that St. Botolph's had possessed the church for more than 45 years.⁵⁵ Perhaps this is prescription indirectly claimed. This act, part of a lengthy series on the disputed church, may reflect the turbulent and uncertain state of ecclesiastical properties and rights in the early years of Henry II's reign.

The remaining allusions come from forged or spurious *acta*. There were ample reasons for ecclesiastical foundations to forge.⁵⁶ Some hoped to claim

52 *Hereford (1079–1234)*, *EEA*, vol. 7, ed. Julia Barrow (Oxford, Oxford University Press, 1993), 50–51 (number 55 in the volume). Sometime before 1148.

53 *Winchester (1070–1204)*, *EEA*, vol. 8, ed. M.J. Franklin (Oxford: Oxford University Press, 1993), 70–71 (number 104 in the volume). Issued sometime between 1146–1171.

54 *Canterbury (1162–1190)*, *EEA* vol. 2, ed. Christopher R. Cheney and B.E.A. Jones (Oxford: Oxford University Press, 1991), 140–42 (number 169 in the volume).

55 *Ely (1109–1197)*, *EEA* 31, ed. Nicholas Karn (Oxford: Oxford University Press, 2005), 45 (number 28 in the volume). As the editor notes, this was part of a protracted litigation heard by papal judges delegate about Gamlingay, and also that Nigel's claim that the canons of St. Botolph's had had continuous possession for more than 45 years may be 'tendentious.' On this case, Mary Cheney, *Roger, Bishop of Worcester 1164–1179: An English Bishop in the Age of Becket* (Oxford: Oxford University Press, 1981), 373.

56 Julia Barrow, "Why Forge English Episcopal Acta?," in *The Foundations of Medieval English Ecclesiastical History. Studies Presented to David Smith*, ed. Philippa Hoskin, et al. (Woodbridge: Boydell, 2005), 25–26.

ecclesiastical jurisdiction, particularly in the north of England.⁵⁷ Monasteries founded after 1100 were prone to this. Not surprisingly, forgers often hoped to back their claims with documents purportedly issued by the archbishop of Canterbury.⁵⁸ The majority concern tithes.⁵⁹

Only one authentic act relatively contemporary with the *De edendo* specifically refers to *praescriptio*.⁶⁰ In 1181–1184, Archbishop Richard of Canterbury wrote to Martin, a priest of Colchester that he had ruled in his favor against a certain Walter. Walter had argued *per prescriptionem longi temporis* that he should be the rightful clerk at Barkway. After the archbishop had issued a peremptory edict, Martin had come to court; however, Walter had neither appeared nor provided a valid excuse. Martin therefore won and, along with receiving the mandate to take full possession of the church, gained the fruits of the church since the beginning of the trial, another sign of the court's familiarity with Romano-canonical process.

It is interesting that in this example the argument was used in a losing cause. Perhaps a good indication of general familiarity with learned law is when it is used in a failed suit, for it demonstrates some awareness (as opposed to specialist knowledge) of how an argument *might just work* in your favor. One recalls here the 'opportunistic' citation of Roman law by earlier bishops like Ivo of Chartres we noted in chapter one.⁶¹ Perhaps Walter viewed prescription in much the same way.

Evidence from both the Council of Northampton and the English episcopal *acta* demonstrates that technical legal terms derived from the civil law, if not widespread in the third quarter of the twelfth century, were not entirely absent. In the case of the *acta*, we should of course remember that prescription was also found in the canons. Another caveat is that recourse to *praescriptio* itself apparently was not absolutely necessary to convey the force of the claim. As noted above, remembering and defending claims to lands and rights were essential in twelfth-century litigation, which may very well make prescription an unusual case, and thus not particularly indicative of how familiar the actors in the ecclesiastical court or, perhaps better put, those who drafted

57 Barrow, "Why Forge," 24–26.

58 Barrow, "Why Forge," 19–20, noting that Rochester, along with Worcester, were particularly prone to forge.

59 Kantorowicz, *The Kings' Two Bodies*, 345, commenting also on prescription, concerning the disruptions caused by the anarchy.

60 It dates from ca. 1181–1184, See *EEA* 2.86–88, (from Canterbury.) The act is number 9 in the volume.

61 On 'taking from Roman law what you need,' Wickham, *Courts and Conflict*, 55.

the *acta*, were with civil law.⁶² Equally, references to ‘thirty years’ or the bare citation of the term do not shed much light on legal knowledge, and how process was developing.⁶³ Nevertheless, such references or even allusions must tell us something about the scope and sophistication of canonistic procedure. Behind them lay the political, religious, intellectual ‘pressure forces,’⁶⁴ creating increasing demand for advocates and judges both trained generally in the civil and canon law,⁶⁵ and skilled in procedure. An early response to this growing demand was Pseudo-Ulpianus’ *De edendo*.⁶⁶

Sometime in the middle of the 1160s, a cleric in the Anglo-Norman kingdom composed an elaborate treatise on legal procedure. Perhaps he had studied at Bologna, as was increasingly common for English clerics. So impressive were its scope and detail that scribes attributed it to no less an authority than the famous Roman jurist Ulpian. Like Bulgarus’ letter, it concerned itself with the civil law;⁶⁷ its single reference to Gratian (on which see below) is exceptional. However, the author of *De edendo* was even more ambitious than Bulgarus. The title itself reveals his intent to treat civilian procedure thoroughly. The author will start at the very beginning, the *editio actionis*, the plaintiff’s declaration that he would sue.⁶⁸

Scholars have known the *De edendo* for the better part of two centuries. It has, however, rarely received detailed examination.⁶⁹ Two editions exist, both consulted for this translation and analysis.⁷⁰ Some have attempted to connect

62 As suggested to me by Professor Hudson.

63 A point emphasized by Duggan, “Roman, Canon, and Common Law,” 392–93. That prescription, while not a part of the common law, may very well have also influenced some decisions by royal judges, Hudson, *Land, Law, and Lordship*, 206.

64 Watson, “Legal Change,” 101.

65 For example, Charles Donahue, jr. “Gérard Purcelle as a Canon Lawyer: Life and the Battle Abbey Case,” in *Grundlagen des Rechts*, 333–48, also Bruce C. Brasington, “A Lawyer of Sorts: Ralph Diss’ Knowledge of Canon and Civil Law,” in *Law and Learning in the Middle Ages. Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History*, 2005, ed. Helle Vogt and Mia Münster-Swendsen (Copenhagen: DJØF Publishing 2006), 147–66.

66 Sometimes it is called “Quoniam ea,” taking the name from its opening. I have elected to retain the more common designation, *De edendo*.

67 Fowler-Magerl, *Ordines*, 65–73.

68 Mousourakis, *Historical and Institutional Context*, 206–07.

69 An exception is Exupère Caillemier, *Le droit civil dans les provinces anglo-normandes au xii^e siècle* (Paris: Ernest Thorin, 1883), 172.

70 The preferred edition is *Incerti auctoris ordo iudiciorum*, ed. G. Haenel (Leipzig: C. Hinrichius, 1838). Haenel also consulted, as have I, an earlier edition based on a single manuscript, Liège, Bibliothèque de l’université 168, 1v–18r: *Ordo iudiciorum cum glossa*

the treatise with Vacarius, the famous, early teacher of civil law in England or his students.⁷¹ Noting Gilbert Foliot's reference to it, Charles Duggan argued that it been compiled in England sometime between 1140–1160 and must have had some connection to Vacarius.⁷² Peter Stein shared this view.⁷³ Over the course of time, there has been less support for his authorship. Peter Landau initially located the treatise a bit later (1160–1168) on the basis of similarities with the *Summa Parisiensis* on Gratian's *Decretum*, though he later argued for an earlier dating of 1157–1159, possibly at Durham.⁷⁴ André Gouron argued for dating after 1165 and composition by a cleric who had studied at Paris and later was somehow connected with the court of King David of Scotland.⁷⁵

sub finem Saeculi XIII e Codice Trevirensi, ed. L.A. Warnkönig (Ghent: 1833). See André Gouron, "Usage de l'hypothèse et reconstruction historique de la science civilistique au XII^e siècle," *Accademia nazionale dei lincei. Atti dei convegni Lincei* 111 (Rome, 1994): 91 bemoaning the fact that new editions have not replaced older editions like Haenel's, also Legendre, *La pénétration*, 27 and n. 4.

- 71 An older example is Herman Cohen, *A History of the English Bar and Attornatus to 1450* (London, 1929, rp. Clark: The Lawbook Exchange, 2005), 95, with review of earlier studies. See, more recently, Gouron, "Usage de l'hypothèse," 106. Possible connections with the *Summa Parisiensis* also suggest legal study in Paris and its environs, on which see Gouron, "Canon Law in Parisian Circles before Stephan of Tournai's *Summa*," *Proceedings San Diego*, 497–503.
- 72 Duggan, "Roman, canon and common law," 394 and n. 101.
- 73 Jason Taliadoros, *Law and Theology in Twelfth-Century England. The Works of Master Vacarius (c.115/1120–c.1200)*. Turnhout: Brepols, 2006), 35–42, Leonard E. Boyle, "The Beginnings of Legal Studies at Oxford," in *Miscellanea Domenico Maffè*, 1.103–27, noting Vacarius' understanding and practice of canon law as a papal judge-delegate; in the same collected essays, Peter Stein, "The Vacarian School," 2.29, noting the particular interest of Vacarius and his students in legal procedure, with reference to the *De edendo*, its dependence on the *Codex* and how the *ordo*'s structure was 'woven together in the manner of the *Liber Pauperum*.' Stein dates the *De edendo* to the 1170 or even earlier and also compares it with *Olim edebatur actio*, composed after 1177. Comparisons between the *De edendo* and *Olim* will be noted in this and following chapters. That the two *ordines* are not entirely interdependent is evident, for example, in their treatment of pacts. On Stein's view that Vacarius' *Liber pauperum* would have been useful for a 'mixed school' of canon and civil law in regards to the *ordo iudiciarius*, Taliadoros, "Synthesizing the Legal and Theological Thought of Master Vacarius," *ZRG KA* 95 (2009): 54.
- 74 Landau, "Die Anfänge," 14–15 and, more recently, "The Origins of Civil Procedure. Treatises in Durham During the Twelfth Century," in *Canon Law, Religion, and Politics*, 136–43. On its use by *Summa Parisienis*, Fowler-Magerl, *Ordo*, 67. For the *Summa Parisiensis*, an example of early French decretist commentary, Rudolf Weigand, "The Transmontane Decretists," in *The History of the Medieval Canon Law in the Classical Period*, 174–210 at 181–82.
- 75 André Gouron, "Un traité écossais du douzième siècle: l'ordo *Ulpianus de edendo*," *TRG* 78 (2010): 8, dating it no later than 1185 and 10–12 for the argument concerning Scotland,

In sum, it appears most likely that the *De edendo* comes from the Anglo-Norman realm, and dates to the first two decades of Henry II's reign.⁷⁶ If Vacarius himself did not compose the work, it nevertheless seems reasonable to suppose he had some effect, however indirect, on its author. Given his fulsome praise of advocates, one also gets a sense he had some experience as a litigator. His comment as well, in the section on appeals, that "many judges deliver bad judgments,"⁷⁷ strengthens this. Our author gives every sign of having litigated, and not always successfully.

Let us consider briefly the sources of the *De edendo*. The author drew from the *Codex*, *Digest*, and *Authenticum*. Gouron suggested as well some connection, perhaps indirect, with both Rogerius' *Summa* on the *Codex*,⁷⁸ and the Anglo-Norman *Brachylogus*, the latter a commentary on the *Institutes*.⁷⁹ It is

based on a short text in London, BL Harley 2355, *Coram summo iudice*, that follows the *De edendo*, a text already noted by Caillemier, *Le droit civil*, 157 and published by Haenel in his edition. Gouron had previously suggested Normandy as the place of composition, on which see "Le rôle," 201.

76 Taliodoros, *Law and Theology*, 47. Arguing for some connection with the Becket dispute, Gouron, "Un traité écosais," 3, noting that London, BL Harley 2355 contains a lengthy insertion in the section *de testibus* concerning the *privilegium fori*. Taken from Nov. 132 c. 21, it would certainly speak to the archbishop's position against the king, which Gouron also argues was behind the composition of the *Brachylogus* written, in his view, by a cleric in the archbishop's service during his exile. Goron also notes that the omission of this insertion in other manuscripts of the *De edendo* was perhaps a prudent decision on the part of the copyists. See also his essay "L'auteur du 'Brachylogus': Un compagnon de Thomas Becket en exil?," in *A Ennio Cortese*, ed. Domenico Maffei, et al. 3 vols. (Rome: Il Cigno, 2001), 2.163–73. On twelfth-century decretists treating the *privilegium fori*, Fraher, "The Becket Dispute," 349–62, arguing that the position of Henry II had support from both Bolognese and Anglo-Norman commentators and that only after the martyrdom of Becket did views change. That the Church's concern to protect its exclusive prosecution of clerics during the struggle between archbishop and king created greater concern for criminal procedure and punishments is argued by Kéry, "Canon Law and Criminal Law," 418–19. See also Helmholz, *The Canon Law*, 110. For more evidence of how the legal issues of the Becket conflict shaped the reception of the *De edendo*, see below, on the addition to the text examined by Dr. Brett.

77 Judicial misconduct was noted by Bulgarus; it will also be considered by the *Ordo Bambergensis*.

78 Note also above in chapter 2 on the *regulae iuris*.

79 André Gouron, "Unus, Testis Nullus dans la doctrine juridique du xii^e siècle," *Medievalia lovaniensia studia* 24 (1995): 87 (noting *Summa Codicis* 4.20§3) and "Placentinus, 'Herold' der Vermutungslehre?," in *Festschrift zum 65. Geburtstag und zur Emeritierung Professor Dr. Hans Kiefner, herausgegeben von Freunden, Kollegen, und Mitarbeitern*, ed. Albert Bleckmann (Münster, 1994), 100, noting similar use of Cod. 4.19.25 by both the *De Edendo* and the *Brachylogus*. Gouron thus argues that both works are not earlier than the 1160s.

in the *De edendo*'s section on appeals that we also find the single mention of Gratian noted above:⁸⁰

Concerning these same chapters, it is prohibited by the law of the Justinianic *Codex* to appeal in the same case for a third time.⁸¹ Whenever and how often anyone wishes to appeal, he shall be able to do so up to the tenth day through that which the *Decretum* sanctions.⁸²

While this reference to canon law demonstrates the author's familiarity, however limited, with Gratian, it is an exception that proves the rule. Like Bulgarus' letter, the *De edendo* concerns itself with civil procedure. Its citation of Gratian just adds to the weight of authorities.⁸³

Another important source is probably Placentinus' *Summa* on the *Codex*.⁸⁴ André Gouron called attention to how the *De edendo*'s treatment of proof

On the *Brachylogus*, from southern France, but also found in glossed form in the north, Weimar, "Die legistische Literatur," 207–08. See also below in the *De edendo*'s discussion of fear (*metus*) in connection with appeals. Finally, for Gratian on this, Liotta, "Il testimone," 92, and the maxim, Helmholz, *The Canon Law*, 340.

80 Haenel, *Incerti auctoris*, 51, calling attention to this passage as indicating the *summa*'s date. For caution in this regard, Gouron, "Un traité écossais," 5. The *De edendo*'s treatment of prescription is also, at one point, not so different from Gratian's at C 16 q. 3 d.p.c. 15, on which see below.

81 Cod. 7.70.1. See also its reception by Gratian at C 2 q. 6 c. 39 and *The Letters and Charters of Gilbert Foliot*, ed. Adrian Morey and C.N.L. Brooke (Cambridge: Cambridge University Press, 2008), 284: Ep. 212, to Pope Alexander III, from 1170, prior to Becket's murder. The letter reviews the conflict and litigation, as well as appeals, the bishop had endured and thanks the pope for absolution. For recent discussion, Jason Taliodoros, "Law and Theology in Gilbert of Foliot's (c. 1105/10 1187/88) Correspondence," *Haskins Society Journal* 16 (2006): 77–94.

82 The source is Nov. 23.1. Compare C 2 q. 6 c. 28.

83 That Gratian, however, could be useful in arguments even early on, consider the citations of Gratian in Tuscany by 1150, Wickham, *Courts and Conflict*, 23435. The case concerns *novalia*, 'cleared land.' In fact 'both sides threw citations from Gratian at each other.'

84 Incorrectly attributing it to Irnerius, *Summa codicis des Irnerius*, ed. Hermann Fitting (Berlin: J. Guttentag, 1894). I shall subsequently refer to the *Summa* by its proper author. On the *Summa*, composed around 1170 at Montpellier, Weimar, "Die legistische Literatur," 201–02, also Hermann Kantorowicz, "The Poetical Sermon of a Medieval Jurist: Placentinus and his 'Sermo de Legibus,'" *Journal of the Warburg Institute* 21 (1938), 22–41. Originally from Piacenza, Placentinus studied at Bologna, probably under Bulgarus. He eventually went to France and has long been considered one of the founders of the law school at Montpellier. On Placentinus, Witt, *Two Latin Cultures*, 425–26.

echoes Placentinus on Cod. 4.19, though without his discussion of exceptions to the maxim *factum negantis per rerum naturam nulla est probatio*.⁸⁵ (The act of denying does not constitute proof.) Further comparison, perhaps even congruence, occurs in the *De edendo*'s discussion of contumacious absence. Again, however, our *ordo* differs a bit from Placentinus, for it does not discuss just cause.⁸⁶ Finally, the *De edendo* follows Placentinus when treating appeal.⁸⁷

We can compare the *De edendo*'s treatment of prescription to its discussion by civilian commentaries. It may, in fact, echo Rogerius.⁸⁸ On the other hand, both Rogerius and Placentinus assumed that good faith and the possession of valid title were necessary in establishing a claim to prescription. The *De edendo*, siding with the *Summa Trecensis*, disagreed.⁸⁹ We also find other similarities with this *summa*, which served as a source for various twelfth-century civilian commentaries.⁹⁰

We should call attention to the *De edendo*'s treatment of exceptions. Even the briefest glance at procedural works, whether civilian or canonistic, composed during the second half of the twelfth century reveals how important exceptions were in litigation. Indeed, as Chris Wickham has observed for Italy, they were widespread after 1170,⁹¹ and took the forms we shall encounter not only in this *ordo* but in those to come, for example the *exceptio rei iudicate*.

85 Gouron, "Un traité écossais," 6. See Placentinus, *Summa codicis*, 4.19. On this passage in Placentinus and the *Codex*, Donald Leonard Filipe, *Post Medieval Ars Disputandi* (Diss. University of Texas, 1991), 165–66, also Robert Feenstra, "Action publicienne et preuve de la propriété, principalement d'après quelques romanistes du Moyen Âge," in his *Fata iuris romani. Etudes d'histoire du droit* (Leiden: Presses universitaires de Leyden, 1974), 125–28, but not considering influence on the *ordines*.

86 Gouron, "Un traité écossais," 6.

87 Gouron, "Un traité écossais," 7, noting Placentinus' *Summa Codicis* 7.62 and 7.65.5.

88 Rogerius, *De diversis praescriptionibus*, PL 146.1486B, also compare C 16 q. 3 d.p.c. 15, viii. Pars. §1. On Rogerius, Witt, *Two Latin Cultures*, 340–41.

89 Rogerius, *De diversis praescriptionibus*, PL 146.1489B, also Placentinus, *Summa Codicis*, 7.36. At this point in the *De edendo*, Haenel also calls attention to the *Summa Trecensis*. On this *Summa*, composed in the middle of the twelfth century at Montpellier, Witt, *Two Latin Cultures*, 337–39.

90 For its possible influence on John of Salisbury's *Policraticus*, Kerner, "Johannes von Salisbury," 506–07. See also Kerner's essay, "Römisches und kirchliches Recht im Policraticus des Johannes von Salisbury," in *The World of John of Salisbury*, ed. Michael Wilks, (Oxford: Basil Blackwell, 1984), 376–77 and, in the same volume, Georg Miczka, "Zur Benutzung der *Summa Codicis Trecensis* bei Johannes von Salisbury, 381–401. Neither extends his consideration of the civil law to the *ordines*.

91 Wickham, *Courts and Conflict*, 49–50.

In considering exceptions, the *De edendo* fully engaged an increasingly vital component of legal procedure.

There were undoubtedly other sources used by the *De edendo*. For example, while aware of Placentinus when discussing privileges and pacts,⁹² the author also adds from an unnamed author a discussion of the reasons for these types of contracts. André Gouron suggested that this may have come from a treatise produced by a Parisian jurist.⁹³ We find occasional parallels with two other treatises. The first is the *Casus Codicis* of William of Cabriano. This was a report of Bulgarus' lectures composed during 1156–1157.⁹⁴ While its recent editor noted William's agreements and occasional disagreements with Placentinus' positions, as well as his views on other glossators derived from the Bolognese *Dissensiones dominorum*,⁹⁵ there has been, to my knowledge, no comparisons of it with the *ordines iudiciorum*. Given the date of William's *Casus*, it is interesting to see to what extent it corresponds with the *De edendo* when both works treat the same text from the *Codex*.⁹⁶ These appear periodically in the notes below. One should also note the slightly later procedural treatise *Olim*

92 As noted in the introduction to chapter 2, the *ars dicataminis* played an important role in this regard, for its application to law was obvious and a practical necessity. Examining a treatise on the composition of privileges, Richard Spence, "A Twelfth-Century Treatise on the Writing of Privileges," *BMCL. NS* 12 (1982): 51–64. Among other things, it distinguishes between private and public law. On the varying ways *pactum* could be understood in the early twelfth century, Keyser, "Agreement Supercedes," 71–72.

93 Gouron, "Un traité ecossais," 7–9, noting Placentinus, *Summa Codicis* 2.3, also the *Quaestiones de juris subtilitatibus*, in *Mélanges Fitting*, 2 vols. (Montpellier: Imprimerie générale du Midi, 1907–08), vol. 2. See also Gouron's essay "Les *Quaestiones de juris subtilitatibus*: Une oeuvre du maître parisien Albéric," *Revue Historique* 303 (2001), rp. in his *Pionniers du droit occidental au Moyen Âge*, cap. ix, 347, 352–53, discussing connections between the *Quaestiones*, Placentinus, and the *Summa Trecensis*. See also below for some parallels with the *De edendo*. Agreeing on the canonistic flavor of the *Quaestiones*, Cortese, "Theologie," 72–73.

94 Tammo Wallinga, *The Casus Codicis of Wilhelmus de Cabriano* (Frankfurt-am-Main: Klostermann, 2005), also his essay "The *Casus Codicis* of Wilhelmus de Cabriano and the *Dissensiones Dominorum* about laesio enormis," *Revue Internationale des droits de l'Antiquité* 56 (2009): 194, accessed at <http://orbi.ulg.ac.be/bitstream/2268/132715/12/11.Wallinga.pdf> on 26 December 2013.

95 Wallinga, "The *Casus Codicis* of Wilhelmus de Cabriano and the *Dissensiones Dominorum*," 195, 204.

96 Compare also, however, a similar distinction between *odio* and *favore* (just considered above in regards to prescription), in Wallinga, *Casus Codicis*, 24, where William of Cabriano, commenting on Cod. 1.18.7, treating *error facti*, comments 'alia non filii fauore, sed creditoris odio'. Here, William draws perhaps on Rogerius, *De diversis praescriptionibus*.

edebatur actio.⁹⁷ Given that *Olim* was composed in the Anglo-Norman world and shares formal similarities with the *De edendo*,⁹⁸ notes to the translation will also refer to this treatise, as well as note agreements and divergences when compared to the *ordines* translated in the remaining chapters.

Recently, Martin Brett has analyzed an addition to the *De edendo*. Preserved in two manuscripts,⁹⁹ it appears before the section on proctors. He notes that this is a complicated combination of a section from the *Authenticum* in *Codex* 1.3.33¹⁰⁰ and Nov. 83, the latter derived from the *Epitome Juliani*, 77.1.¹⁰¹ There is no obvious reason why this text, which is rather repetitive, appears at this point in the *De edendo*. How it extends the treatise, however, is obvious. The ecclesiastical forum was essentially latent in the *De edendo*. From the start, the *ordo*'s concern was the civil law. This addition directly treats the distinction between civil and ecclesiastical procedure, a subject of vital importance in the contentious age of Becket. It favors the king's position on criminous clerics.

The extent of clerical knowledge of canon and civil law in England during the middle of the twelfth century will never be precisely known. However, even in the 1160s, one can be confident that there were readers ready to study and likely use the *De edendo*. Throughout the Anglo-Norman world clerics, with

97 According to Fowler-Magerl, *Ordo*, 76, *Olim edebatur actio* dates from sometime after 1177 for it includes a decretal of Alexander III (JL 14156). Suggesting its author was English or Scottish and connected to the schools of Paris, and possibly Rodoricus Modcipassus, André Gouron, "Qui a écrit l'ordo 'Olim edebatur'?", *Initium* 8 (2003): 79–80, rp. in his *Pionniers du droit occidental au Moyen Âge*, cap. xiii.

98 Fowler-Magerl, *Ordo*, 77–78.

99 London, BL Add. 49366, fol. 107v; BL Harley 2355, fol. 3rb. There may be evidence of this text also in Bruges, Bibl. de la ville, 99, fol. 187r–190vb; Paris, BN lat. 4715, fol. 17–25r. I thank Dr. Brett for making his transcription and analysis available to me.

100 In a personal communication, Dr. Brett provides the following: Clericus quoque, in lite pulsatus pecuniaria causa, prius apud episcopum conveniatur, per quem sine damno causa decidatur. Quod si natura causae vel alia ratio faciat ut negotium apud eum decidi non ossit, per civilem procedat iudicem, observatis clericorum privilegiis, nec mora circa alia fiat. §1 Sed in civili crimine civilis praesit iudex, ut lis intra duos non egrediatur menses; nec tamen puniatur, etiam si reus inveniatur, priusquam per episcopum sacerdotio spoliatur.

101 On this *Novel*, Cimma, *L'episcopalis audientia*, 137–39. Dr. Brett has informed me that this could have been transmitted from the Ivonian *Decretum*, 4.427, 16.150 and then to the Pseudo-Ivonian *Tripartita*, 3.10.51, 3.29.93. The *Tripartita* was an important source for Gratian's *Decretum*, on which see Winroth, *The Making of Gratian's Decretum*, 17–18 and, for a preliminary edition, <https://ivo-of-chartres.github.io/tripartita.html> accessed on 17 June 2015.

varying degrees of legal training,¹⁰² were turning to the Roman law.¹⁰³ While dense with civilian terminology and citations, the *De edendo* was, as André Gouron noted, logical and precise.¹⁰⁴ These qualities no doubt assisted its transmission, and prompted a body of glosses, all added before 1180.¹⁰⁵ Perhaps these were connected to Lincoln, which Peter Landau has recently argued was a center of legal study.¹⁰⁶

There are other signs of the *De edendo*'s influence. Gilbert of Foliot used it in his correspondence.¹⁰⁷ It was inserted into a *summa* in the 1180s.¹⁰⁸ We find it placed alongside older English legal texts, for example the *Laws of Ine* and the *Quadripartitus*, to form something like a reference book.¹⁰⁹

The *De edendo* is very much a specialist's work. Like Bulgarus, the author made no concessions to his reader. Those not very familiar with the civil law were likely challenged.¹¹⁰ At the same time, he was undoubtedly a cleric and occasionally we have some sign that the treatise was not unaware of the litigation found in the ecclesiastical court. For example, when treating greater and lesser claims, the author illustrates the distinction with the example of whether one is suing for an entire church or only a part.

To conclude: if an exact date and location for the *De edendo*, remain uncertain, it numbers among the earliest *ordines* produced in the Anglo-Norman

102 In general, André Gouron, "Une école ou des écoles? Sur les canonistes français (vers 1150–vers 1210)," in *Proceedings Berkeley*, 223–40.

103 Helmholz, *The Canon Law*, 123–24, on Robert Chesney (Lincoln), Bartholomew of Exeter, Gilbert Foliot (Hereford and London) and Gerald of Wales.

104 Gouron, "Un traité écossais," 3.

105 On these glosses in the two London manuscripts, BL Royal 10 B iv and Harley 3834, André Gouron, "Une école de canonistes anglais à Paris: Maître Walter et ses disciples (vers 1170)," *Journal des Savants* (Janvier–Juin, 2000), (rp. in his *Pionniers du droit occidental au Moyen Âge*, cap. vi, 68–69 and, more recently, "Un traité écossais," 2–3.

106 Gouron, "Un traité écossais," 13 and n. 34, also Landau, "The Origins of Legal Science."

107 Duggan, "Roman, Canon, and Common Law," 394 and n. 101 and Taliadoros, "Law and Theology," 94.

108 Gouron, "Un traité écossais," 9.

109 On this manuscript, British Library, Add. 49366, Bruce O'Brien, "An English Book of Laws from the Time of Glanvill," in *Laws, Lawyers, and Texts. Studies in Medieval Legal History in Honour of Paul Brand*, ed. Susanne Jenks, Jonathan Rose, and Christopher Whittick, (Leiden and Boston: Brill, 2012), 57.

110 It is interesting to contrast the *De edendo* with the contemporary work by Bertram of Metz who, like Bulgarus, commented on the Digest's *De regulis iuris*. There is every indication that Bertram was familiar with the Roman law, if not perhaps to the extent of the *De edendo*'s author. However, Bertram periodically illustrated the law with examples from everyday life, for example commerce. See *Betrandus Metensis de regulis iuris*, ed. Severino Caprioli (Perugia: Università di Perugia, 1981).

world. It furnished the reader with an encyclopedic coverage of civilian procedure. Later *ordines* would add relatively little civil law; instead, they would furnish canons from Gratian, phrases and concepts from the decretists and, above all, papal decretals,¹¹¹ to make their treatment of procedure as current as possible. The *De edendo* helped with the harvest and assimilation of civilian procedure begun by Bulgarus, Placentinus, and Vacarius. Its author provided much for eager students, litigators, and judges to consider, and take to court, in the turbulent age of Becket.

The Judicial Order¹¹²

On bringing the charge	On prescriptions
On summoning	On advocates
On opposing judges who desert the trial ¹¹³	On forms of proof
On giving sureties	On witnesses
On proctors	On privileges
On taking the oath concerning calumny	On taking oaths
On the judicial order and hearing the case	On pacts
On compensation	On transactions ¹¹⁴
On overclaims ¹¹⁵	On the office of the judge
On exceptions	On false documents
	On arbiters
	On appointing the judge
	On appeals

¹¹¹ Among many studies, Anne J. Duggan, "Making Law or Not? The Function of Papal Decretals in the Twelfth Century," in *Proceedings Esztergom*, 41–70.

¹¹² This table is not found in all manuscripts. See also Nörr, *Prozessrecht*, 37–38.

¹¹³ Note that this differs from the rubric we find in the text. The key term, however, is *eremodicium*, an unexcused absence from court, Berger, *Encyclopedic Dictionary*, 455, also Litewski, *Zivilprozeß*, 277 on the *De edendo*. On *confessio*, generally, Nörr, *Prozessrecht*, 75. The chapter in the *De edendo* treats it generally, and not just concerning judges absent without legal cause.

¹¹⁴ Berger, *Encyclopedic Dictionary*, 740: *Transactio* was a form of extra-judicial settlement. Dig. 2.15.1 and Cod. 2.4.39. See also below.

¹¹⁵ *Encyclopedic Dictionary*, 633. *Plus petitio* was claiming more than due. This will not only be a concern in this *ordo* but, especially, in the *Ordo Bambergensis*, on which see chapter 5.

Since it is very useful to know what happens frequently in civil cases, shameful not to know anything at all, permissible to be ignorant of a few things,¹¹⁶ but even more deplorable not to know what one really should know, that is, matters which more often occur in litigation, we are hard-pressed to sum them all up in few words. However, since jurisprudence is so essential when we have to summon others into court or if we ourselves are compelled to come, let us first consider the entry into the trial. Here is an order for judgments.

On Bringing the Charge¹¹⁷

When anyone has the right to pursue a claim against another, he ought to bring the charge by which he wishes to proceed in court so that the defendant may have a minimum of twenty days to consider whether to yield without trial or contest.¹¹⁸ To bring the charge is nothing other than to show the reason why one wishes to contest another.¹¹⁹ The charge reveals the form of the future trial.¹²⁰ It is brought either through denunciation before witnesses or in writing, that is, through written complaint to the magistrate.¹²¹ He appears to charge who brings his opponent to the official

¹¹⁶ In general, Roumy, "L'ignorance du droit."

¹¹⁷ On this section of the *De edendo*, Litewski, *Zivilprozeß*, 226, comparing also *Ordo Bambergensis*, cap. i and *Practica legum*, cap. 7. Like exceptions, actions were also among the most common civilian elements in litigation in this period, on which see Wickham, *Courts and Conflict*, 55.

¹¹⁸ Dig. 2.13.1pr. and Nov. 53.3.2. On contemporary examples of the *libellus*, mostly outside the Anglo-Norman world, André Gouron, "Modèles de libelles accusatoires en pays alémanique (Zurich, 1147) et en Provence (Nîmes ou Avignon, 1154/1150)," in *Ins Wasser geworfen*, 307–16, with reference to the influence of Bulgarus' *De iudiciis* and the *Summa Trecensis*, as well as discussing works such as the *Summa Coloniensis* and the *Summa* of Stephen of Tournai, but not our *Ordo*. See, however, 313–14 for discussion of the Anglo-Norman *Brachylogus juris civilis*, which Gouron argues was composed by someone in the entourage of the exiled Thomas Becket. On Stephen's familiarity with the civil law see Emanuele Conte, *Servi medievali. Dinamiche del diritto commune* (Rome: Viella, 1996), 70 and nn. 7–8. Finally, on the development of *litis contestatio* in the *ius commune*, Helmholz, *The Canon Law*, 325–26.

¹¹⁹ This betrays a debt to Placentinus, on which see Fowler-Magerl, *Ordo iudiciorum*, 7 n. 15 and above.

¹²⁰ Cod. 2.1.3.

¹²¹ Berger, *Encyclopedic Dictionary*, 561–62 and Mousourakis, *Historical and Institutional Context*, 368 for the *libellus conventionis*, which was not addressed to the defendant, as

list and states before it that he shall declare something against him.¹²² In bringing the charge, he only should offer what suffices to instruct the opponent, that is, the arguments or pleas which the plaintiff shall employ before the judge.¹²³ It is not necessary to furnish documents, that is, charters, chirographs, etc. defined by the name of instruments, which he shall not use before the judge.¹²⁴ If anyone be present before a judge when the charge has not first been brought and later set forth his complaint in the records and summon his adversary to trial the defendant, after hearing these allegations, he shall be able to request before the judge, under the form of 'a charge not brought,' that he be granted the stay customarily permitted the defendant and those summoned to court,¹²⁵ the period in which to deliberate whether to yield or contest. If the judge denies this to the defendant, he leaves him with a just reason for appeal. At present, let this suffice concerning the bringing of the charge; but since after the charge is brought the defendant might decide to contest rather than yield, he must be called to court to litigate. We should thus say something about the summons to court.

had been the case earlier but, by the Dominate, was addressed to the court. See also Travers Twiss, "The Twelfth Century, the Age of Scientific Judicial Procedure. ii. The Pseudo-Ulpian (Ulpianus de Edendo)," *Law Magazine and Law Review* (May 1894): 200, discussing this passage in the *De edendo*. See also chapter 2, where Bulgarus discusses confrontation and, more generally, Hyams, "Due Process," 75–76. On the *libelli oblatio*, Nörr, *Prozessrecht*, 86 and, for the *De edendo* here, Litewski, *Zivilprozeß*, 227 n. 25, 229 n. 58, and 407 n. 784, comparing *Olim edebatur actio*, also "Mündliche Klage," 670–71.

122 As Fowler-Magerl, *Ordo iudiciorum*, 67 notes, Haenel gives *alium* instead of *album*, which is found in Dig. 2.3.1.1. The *lectio difficilior* would be *album*, the board on which edicts were posted. See Berger, *Encyclopedic Dictionary*, 359. (On the *album iudicium* in the archaic period, where the praetor listed those who could serve as judges, Mousourakis, *Historical and Institutional Context*, 128.) On this in regard to a passage in the *Summa Parisiensis*, Gouron, "Un traité," 4–5, noting that this is, at best, a tenuous point of connection with the *De edendo*. See also Litewski, *Zivilprozeß*, 226 and n. 21.

123 On *cautiones*, Berger, *Encyclopedic Dictionary*, 384.

124 Compare Dig. 2.13.1.3. On preference for oral testimony over documents, see J. Phillipe Lévy, *La Hiérarchie des preuves dans le droit savant du moyen-âge depuis la Renaissance du Droit Romain jusqu'à la fin du xiv^e siècle* (Paris: Librairie du Recueil Sirey, 1939), 88 also, for this passage in the *ordo*, Litewski, *Zivilprozeß*, 249 and n. 306, also 423 n. 1005, comparing *Ordo Bambergensis*, cap. xvi which treats private instruments.

125 Compare C 3 q. 3 c. 1. In general, Brundage, *Medieval Origins*, 416, Nörr, *Prozessrecht*, 50, and Müller, *Päpstliche Delegationsgerichtbarkeit*, 182–83 on the *induciae deliberatorie*. For a close examination of this *causa*, John Noël Dillon, "Case Statements (themata) and the Composition of Gratian's Cases," *ZRG KA* 92 (2006): 306–20.

Concerning the Summons¹²⁶

To summon is to call for the reason to claim a right.¹²⁷ One should do this before the one who shall declare the law. Someone is called to judgment by the first edict through the *apparitores*.¹²⁸ These compel litigants to appear before the judge, and thus are called *apparitores*, because they cause people to appear in court.¹²⁹ However, if the one summoned shall not comply, he ought to be called a second and third time and, afterwards, by the peremptory edict¹³⁰ or, most commonly, with this edict taking the place of all. However, that is given by the dispensation of the judge according to the examination of the case, the nature of the business, and individual circumstances.¹³¹ It is according to the type of case or matter if, for example, the case be urgent. It is according to the quality of the person, for example, if delay would be dangerous to the plaintiff and the defendant could easily come to judgment.¹³² If, however, the defendant solemnly called to judgment should refuse to come, the plaintiff ought to be placed in possession of his goods.¹³³ If immoveable property

126 On *in ius vocatio*, Richard H. Helmholz, "Citations and the Construction of Procedural Law in the *Ius Commune*," in *The Creation of the Ius Commune. From Casus to Regula*, ed. John W. Cairns and Paul J. du Plessis (Edinburgh: Edinburgh University Press, 2010), 253, noting this section in the *De edendo*, as well as Placentinus and Johannes Bassianus. See also Lange and Kriechbaum, *Römisches Recht*, 207–11. For more on Bassianus, see below.

127 Dig. 2.4.1.

128 A type of public servant, on which see Cod. 12.53.

129 The text also appears in the Constitution produced at Pavia mentioned in the introduction to chapter 2. See Fitting, *Die Institutionenglossen des Gualcausus*, 122.7–8.

130 Dig. 5.1.72. On the peremptory edict, compare Bulgarus' letter, also, for the *De edendo* here, Litewski, *Zivilprozeß*, 281 n. 75, also 282 n. 100, comparing Bulgarus and *Ordo Bambergensis*, cap. iii. For a contemporary example, compare an act of Bishop Henry of Bayeux from ca. 1174–1173, deciding, as judge-delegate, a dispute between the abbey of Saint Evroul and a cleric, Hugo of Le Nid, in Müller, *Päpstliche Delegationsgerichtsbarkeit*, 2.12.

131 The phrase is *qualitas personarum*, on which see Litewski, *Zivilprozeß*, 281 n. 81. This point is not shared with the other *ordines* treated in this study.

132 On these concerns in papal decretals, Landau, "Rechtsfortbildung," 88 and n. 166.

133 Compare Nov. 53.4.1. On the influence of the civilian distinction between *possessio* and *proprietas* in twelfth-century England, Mary Cheney, "*Possessio/proprietas* in Ecclesiastical Courts in mid-12th-century England," in *Law and Government in Medieval England and Normandy. Essays in Honour of Sir James Holt*, ed. G. Garnett and J. Hudson (Cambridge: Cambridge University Press, 1994), 242–54, Hudson, *Land, Law, and Lordship*, 267, also Helmholz, *The Canon Law*, 126 and n. 177, on Bishop Roger of Worcester's reference to

is sought, he is placed in possession. If he claimed some debt, he ought to be placed in possession of the goods in the stated amount. However, the claimant is not placed in possession of the goods he seeks so that he may legally possess but, by possessing the property in order to preserve it, he may not convert anything to his own use.¹³⁴ The accused, vexed by this possession, may then come to respond.¹³⁵

The defendant is granted one year in which, if he comes and gives surety to the presiding judge and pays the plaintiff the expenses of the trial,¹³⁶ he shall be placed in possession so that he might immediately respond. Should he not come in that year, the plaintiff is ordered to possess and, if the defendant comes later, let him be heard only about ownership. If, however, the defendant, summoned by the peremptory edict, should come and the plaintiff were absent, and is asked whether he wishes to yield or the case is less urgent, one should say that he did not yield but only that the urgency of the case had passed.¹³⁷

missio in possessionem in a dispute concerning Holy Trinity, Colchester and, most recently, Duggan, "Roman, canon, and common law," 394 and n. 97, also Wickham, *Courts and Conflict*, 50 on the distinction in twelfth-century Italian legal texts. For the *De edendo* here, comparing also *Ordo Bambergensis*, cap. iv and *Olim edebatur actio* §293–316, Litewski, *Zivilprozeß*, 286–87 and n. 142. On the twelfth-century English law, Joshua C. Tate, "Ownership and Possession in the Early Common Law," *The American Journal of Legal History* 48.3 (2006): 280–313, with reflection as well on the influence of the civil law, especially from Vacarius. For contemporary Italy, specifically Lucca, Wickham, *Courts and Conflict*, 50 noting the distinction was common, though 'it was about the terminology and rhetoric, rather than about the content of legal thinking and argument.' We shall return to this observation in the Conclusion to this study.

134 On the *missio in possessionem bona rei servandae causa*, Berger, *Encyclopedic Dictionary*, 585 and, for the classical law, Mousourakis, *Historical and Institutional Context*, 216–19. Compare Dig. 41.2.10.1. This appears also in papal decretals from the second half of the twelfth century, on which see Nörr, "Päpstliche Dekretalen," 60 and more generally, *Prozessrecht*, 111. On *causa rei servandae* here in the *De edendo*, Litewski, *Zivilprozeß* 292 and n. 211, comparing also *Olim edebatur actio* §293. It is not found in the other *ordines* discussed in this study.

135 Schlinker, *Litis Contestatio*, 205 and nn. 455–456, though not citing the *De edendo*. For comparison with its use in papal decretals, Nörr, *Päpstliche Dekretalen*, 69.

136 Compare Bulgarus, and the *Ordo Bambergensis*, cap. iv, on which see Litewski, *Zivilprozeß*, 296 nn. 241, 569.

137 Dig. 5.1.73.2.

On the Unexcused Absence¹³⁸

Let us see what ought to be established by law if, on the contrary, both parties came to court, contested the charge and, subsequently, one abandoned the trial. Neither is allowed to be absent with impunity.¹³⁹ It is in the interest of the judge that neither be absent. Each criminal case is concluded in two years, and a civil case, in three,¹⁴⁰ so that the trial not be prolonged. If, however, it should be prolonged by fault of the judge or either of the litigants, a superior judge shall be condemned to a penalty of ten pounds of gold and, if a minor judge,¹⁴¹ three pounds.¹⁴² There is no one so contumacious who could prolong the case if the judge were unwilling.¹⁴³ If either judge (superior or inferior) abandoned the trial, he should be penalized for negligent absence. This absence of either party shall be shown more clearly in what follows. If, however, the plaintiff is absent and the defendant, wearied by multiple delays, is present and blames the plaintiff's absence, after almost three years have passed and only six months remain,¹⁴⁴ the plaintiff shall be summoned by a triple edict to appear within ten days.¹⁴⁵ If, so requested, he does not appear within that period, and nothing has happened, it shall be clear to the judge what must be done: the defendant must be freed from judgment.¹⁴⁶ If he has presented sureties or given pledges, these are also freed from obligation. The plaintiff shall be punished with the expenses of the trial,¹⁴⁷ their amount declared by the defendant under oath.¹⁴⁸ If, however, there is no imminent threat of the three-year period ending, and hope remains that the absent party shall return, a penalty shall be delivered by con-

138 Cod. 3.1.13.3. In general, Brundage, *Medieval Origins*, 447 and n. 127.

139 On this section, comparing also the *Ordo Bambergensis*, cap. iv, Litewski, *Zivilprozeß*, 275.

140 Cod. 3.1.13pr. and Cod. 3.1.13.1. See Brundage, *Medieval Origins*, 29 and n. 99.

141 On the distinction here between judges *maior* and *minor*, Litewski, *Zivilprozeß*, 95 and n. 248. This is not found in the other *ordines* in this study.

142 Cod. 3.1.13.8.

143 See above, Cod. 3.1.13.1.

144 Litewski, *Zivilprozeß*, 291 and n. 196, in contrast to the *Ordo Bambergensis*, cap. iv.

145 Cod. 3.1.13.2. This ten-day interval is shared with *Olim edebatur actio* §615, but not with the *ordines* considered elsewhere in this study, on which see Litewski, *Zivilprozeß*, 284 n. 118.

146 Litewski, *Zivilprozeß*, 481 n. 432, comparing also *Ordo Bambergensis*, cap. iv and *Olim edebatur actio* §637.

147 Litewski, *Zivilprozeß*, 469–70.

148 Cod. 3.1.13.2a. See Litewski, *Zivilprozeß*, 286 and n. 142, with reference also to *Olim edebatur actio* §616, 617, and *Ordo Bambergensis* cap. iv.

demnation to pay the expenses.¹⁴⁹ Let this, however, not be the end and final sentence of the trial as when the three-year deadline draws near.¹⁵⁰ However, if something is charged which makes it clear to the judge about the reason (for the absence), and then the plaintiff is absent, then let him be summoned by a threefold citation by the *apparitores*, just as we said and, if he should not come, let the judge inquire. Should the judge find that there is a better reason for his absence, then he should not delay to declare on behalf of the absent party, nevertheless with the expenses of the trial excepted that the defendant vowed he had legitimately spent.¹⁵¹ These are, for example, producing witnesses or giving gifts or other things customarily paid in trials.¹⁵² If the penalty seems insufficient to the plaintiff and later, having returned, he wishes to renew the dormant trial, let him have no opportunity to escape this penalty imposed for his contumacious absence.¹⁵³

On the contrary, if the defendant contesting the trial should be absent, and a similar summons came for him (just as we said about the plaintiff) let the judge not delay to bring a charge of negligent absence. If the judge should determine that the plaintiff's case is stronger, let him not hesitate to bring a sentence on his behalf against the absent defendant. Whoever is executing the decision, either himself or a superior judge, also should not omit the expenses of the trial. If the defendant should later return and wish to give surety, let legal recourse be closed to him and he shall not be heard even if he appealed.

However, when negligent absence is discussed, let the judge not fear the obstacle of appeal, but let him declare the sentence without fearing it. For contumacy excludes the aid of appeal. Absence suffices (to demonstrate) contumacy unless the absent party prove the contrary.¹⁵⁴

There are many exceptions with which one can excuse his absence.¹⁵⁵ He must be helped if prevented from coming because of involvement in a major case, detained by bad health, hindered by a family funeral,

149 Litewski, *Zivilprozeß*, 481 n. 444, comparing also *Olim edebatur actio* §637. The *Ordo Bambergensis* does not consider this.

150 Cod. 3.1.13.5.

151 Cod. 3.1.13.2b.

152 These were the *sportulae* discussed in the Introduction. On payment to witnesses here, Litewski, *Zivilprozeß*, 570 n. 21. The other *ordines* in this study do not take this line.

153 Cod. 3.1.13.2c.

154 Dig. 5.1.73.3. On this passage and connection to Placentinus' *Summa Codicis*, see above in the introduction to this chapter.

155 Litewski, *Zivilprozeß*, 277, comparing also Bulgarus and *Ordo Bambergensis*, cap. iv, vii.

storms, or by the force of a river, for example if the bridge were destroyed, or (if he were) appointed to a testament, or detained without any deception on his part or held in chains by a magistrate without any crime.¹⁵⁶ However, if he did not come on the prescribed day but afterwards, on the third, fourth or, finally, even up to the tenth day, were prepared to come to court, with the plaintiff's case not worsened by the delay, he ought to be aided by exception.¹⁵⁷

On Providing Surety

Following the preparatory matters concerning trials, let us now see about the judgments themselves. But since sureties are necessary in these, let us consider them first.¹⁵⁸ Let us see what it is to provide a surety, who ought to give it, and when. Giving surety is to furnish a fixed bond from those standing surety or by means of a pledge.¹⁵⁹ One providing surety to the judge for the sake of bringing another to court ought to be trustworthy not only in his means but also in his ability to come to court.¹⁶⁰ If it is necessary that one should have to give surety and cannot easily provide it where he is being sued, he can be heard if prepared to offer

156 Various passages of the *Digest* may be consulted: Dig. 2.11.2.3, Dig. 2.11.4.2, Dig. 2.11.2.7, Dig. 2.11.4.1, Dig. 2.11.2.9. Compare here Rogerius, *De diversis praescriptionibus*, PL 146.1494D–1495A.

157 Compare Dig. 13.3.3. As we saw in the letters of Ivo of Chartres delay, whether licit or not, was a concern. It remained so with the *ordines* and later law. On its importance in the early Common Law, Paul Brand, "Delay in the English Common Law Courts (Twelfth to Fourteenth Centuries)," in *The Law's Delay. Essays on Undue Delay in Civil Litigation*, ed. C.H. van Rhee (Tilburg: Intersectie, 2004), 31–45 also, generally, Nörr, *Prozessrecht*, 41–44.

158 Compare, however, an act of Bishop Henry of Bayeux from 1164–1173 discussed by Müller, *Päpstliche Delegationsgerichtsbarkeit*, 2.127, noting that a priest offered an alternative: Et quoniam clericus omnem subterfugii suspensionem a se remove uolebat, loco cautionis certam penam promisit, nisi ad diem venieret et nostro pareret iudicio.

159 Dig 2.8.1. See, in general, Nörr, *Prozessrecht*, 82–83, also Helmholz, *The Canon Law*, 125–26, noting a request from a litigant for a *satisfactio* from the court of Archbishop Theobald of Canterbury. This demonstrated both the growing interest in, and appetite for, the civil law in ecclesiastical litigation, and the challenges it placed on clerics insufficiently trained in it.

160 Dig. 2.8.2. In general, Mousourakis, *Historical and Institutional Context*, 369, and for the classical law's requirement that both plaintiff and defendant meet face to face, Hermann and Speer, "Facing the Accuser," 484–88, also above in chapter 2 for Bulgarus on the subject.

surety in another city of the same province.¹⁶¹ Whenever anyone is sued, he ought to give surety to the judge. A plaintiff who sues on his own behalf ought to pledge nothing. If, however, he sues on behalf of another, then he ought to pledge that his principal would consider the suit (legally) correct and give surety concerning the defense to be made.¹⁶²

On Proctors¹⁶³

The penalty of the proctor not defending his principal is the denial of the suit.¹⁶⁴ The surety of ratification is required from the proctor when there is doubt about the mandate of the principal.¹⁶⁵ The defendant ought to provide surety that he shall remain under judgment until the conclusion

¹⁶¹ Dig. 2.8.7.1.

¹⁶² Dig. 46.8.1 and Dig. 46.8.8. See, in general, Käser, *Rechtsgeschichte des Altertums*, 280 and Nörr, *Prozessrecht*, 30–31. On the *procurator* in Gratian and *de rato*, Antonio Padoa Schioppa, “Sul principio della rappresentanza diretta nel Diritto canonico classico,” in *Proceedings Toronto*, 111–12.

¹⁶³ The addition discovered by Dr. Brett appears before this section. See below. On proctors, generally, Nörr, *Prozessrecht*, 28–32 and Litewski, *Zivilprozeß*, 156, comparing also the *Practica legum*, cap. 27, *Olim edebatur actio* §512, and *Ordo Bambergensis*, cap. vi.

¹⁶⁴ Dig. 3.3.43.4 The proctor's duty to defend is found not only here but also in *Ordo Bambergensis*, cap. vi and *Olim edebatur actio* §249, among many sections, on which see Litewski, *Zivilprozeß*, 172 and n. 253. That it was a common practice in contemporary England for men to grant land to individuals to represent themselves and their tenants, but that these men were chosen more for their power and influence, and family connections, than for any legal skill, Brand, “The Origins of the English Legal Profession,” 34.

¹⁶⁵ Dig. 46.3.12.4, also Cod. 2.12.1. On *ratihabitio*, legal ratification or approval of a transaction done on another's behalf, Berger, *Encyclopedic Dictionary*, 667, also Litewski, *Zivilprozeß*, 168–69, comparing *Practica legum*, cap. 27; and 165–66 and n. 152 on the mandate, comparing, again *Practica legum*, cap. 27, also *Ordo Bambergensis*, cap. vi, and *Olim edebatur actio* §248, among several paragraphs. On the mandate in the classical law, see Allan Watson, *Contract of Mandate in Roman Law* (Oxford: Oxford University Press, 1961); for our period, Pierre Legendre, “Du droit privé au droit publique: Nouvelles observations sur le mandat chez les canonistes classiques,” *Mémoires de la Société pour l'Histoire du Droit et des Institutions des anciens pays bourguignons, comtois et romands* 3rd. Fasc. (1970–1971): 7–35, rp. in his *Écrits juridiques du moyen âge* (London: Variorum, 1988), with same pagination. Legendre discusses differing opinions by civilians on whether not following the mandate made the procurator infamous. Vacarius and Imerius took this position; Burgarus did not. Placentinus was silent.

of the trial and, if he should sue on another's behalf,¹⁶⁶ ought also give surety that the judgment shall be paid unless the principal provided surety for it on his behalf. One has to give surety where he is being judged. Let the plaintiff follow the court of the defendant, not the defendant that of the plaintiff.¹⁶⁷ One must be sued where he has his residence at the time of the contract.¹⁶⁸ He must not be sued before a judge who has no jurisdiction over him, unless he has specifically renounced his privilege of court.¹⁶⁹ Whoever should subsequently be sued, either a soldier or someone under the jurisdiction of another court is, as it were, prevented from having the right to revoke the court.¹⁷⁰ Whoever possesses immovable property in the city is not burdened with giving surety.¹⁷¹ If anyone promised another that he would appear in court, he ought to be present, so that the suit may not become more difficult in location or condition.

After surety given by both parties, the oath concerning *calumnia* must be made first.¹⁷² The plaintiff ought to swear that he did not bring the charge from a spirit of calumny. The plaintiff is understood as the one who sues in his own name. The defendant ought to swear that he considers he has good reason to come to court to oppose the charge.¹⁷³ Each shall also vow that in the course of the trial he shall only argue what the truth requires and neither give something to the judge nor to the witnesses nor seek, either himself or through others, to delay the trial through deception.¹⁷⁴

166 Dig. 3.3.43.5 (4). See Litewski, *Zivilprozeß*, 170 and n. 222, comparing also *Olim edebatur actio* §255, among various paragraphs, and the *Ordo Bambergensis*, cap. vi.

167 Cod. 3.13.2, also Cod. 3.19.3. Compare also a decretal of Pope Alexander III, (JL 9033, x 2.2.5). The distinction between an action *in rem* and *in personam* was ancient, on which see Mousourakis, *Historical and Institutional Context*, 196–97, treating the pre-classical period of the Roman law. See also, in general, Nörr, *Prozessrecht*, 61, Kaser, *Zivilprozeßrecht*, 588–89 and n. 3 and discussing Cod. 3.13.2 in light of the late-antique imperial recognition of bishops' courts, and Helmholz, *The Ius Commune*, 196, 202–03 on Alexander's decretal.

168 Cod. 2.46.0.

169 On the *privilegium fori*, Dig. 2.5.1.

170 Dig. 5.1.7.

171 Compare Dig. 2.8.15pr.

172 In general, Cod. 2.58, on which see below. In addition to the discussion in chapter 2, compare also Placentinus, *Summa Codicis*, 150 and Brundage, *Medieval Origins*, 28, 296.

173 Compare Cod. 2.58.2pr.

174 Compare Cod. 2.58.1pr. On the Roman law of agency and how it was understood in medieval canon law, with consideration of medieval England, though without mention of

What they did not declare to (their) advocates, they are not compelled to swear in court.¹⁷⁵ Advocates are allowed to sell a just defense in court but neither witnesses their testimony nor the judge, justice.¹⁷⁶ Certainly, it was divinely established that he should lose the case who, mistrusting a just sentence, placed the hope of his suit in bribery.¹⁷⁷ This oath ought not to be remitted either to reluctant or consenting parties. If the plaintiff should not want to take this oath, let him lose as a dishonest litigant.¹⁷⁸ If the defendant does not wish to vow, he should be considered as having confessed.¹⁷⁹ If the rank or sex of the person does not permit them to appear before the judge, that is, to swear in public, then let the oath be given in their home in the presence of the opposing party or his proctor.¹⁸⁰

Concerning the Judicial Order¹⁸¹

With these things done, the trial begins and is contested. The judge listens to the statements of both parties. In exercising and establishing

the *De edendo*, Vernon F. Snow, "The Evolution of Proctorial Representation in Medieval England," *The American Journal of Legal History* 7.4 (1963): 325–26, noting proctors sent to Rome in the twelfth century.

175 On this passage in the *De edendo*, comparing also the *Ordo Bambergensis*, Mausen, *Veritatis adiutor*, 578, that this was an essential point (point de distinction essentiel) in how a party dealt with his advocate.

176 This was also later considered by Aquinas, *In iv Sententiarum*, *Dist 25 q. 3 art 2. (2)*: Ad nonum dicendum, quod iudex ex officio suo tenetur iudicium reddere: similiter etiam quilibet tenetur ex hoc quod est iudicio subditus, ad verum testimonium reddendum. Sed advocatus non tenetur patrocinium suum causae praestare, nec jurisperitus dare consilium; et ideo, sicut dicit Augustinus ad macedonium, non debet iudex vendere verum iudicium, aut testis, verum testimonium, quia advocatus vendit justum patrocinium, et jurisperitus verum consilium. Non enim advocatus vendens justum patrocinium, iustitiam vendit, quae est spiritualis, sed actum suum; et similiter dicendum est de consilio jurisperiti. Sed iudex vendendo verum iudicium, simoniam committit, si sit spiritualis iudex: alias non committit simoniam, sed graviter peccat; et similiter dicendum est de teste, accessed at <http://www.clerus.org/bibliaclerusonline/it/b43.htm> on 30 July 2011.

177 Cod. 7.49.1.

178 Cod. 2.58.2.6.

179 Cod. 2.58.2.7. See Schlinker, *Litis contestatio*, 101, Nörr, *Prozessrecht*, 79, and Litewski, *Zivilprozeß*, 377 n. 307, comparing also the *Ordo Bambergensis*, cap. xix.

180 Cod. 2.58.2.1.

181 Some manuscripts also add *De litis contestatione*.

judgment, he preserves the order of questions.¹⁸² If both parties wish to plead, let the one who sued go first,¹⁸³ if the case for both parties is civil or neither is prejudicial.¹⁸⁴ If one is criminal, then that is prejudicial;¹⁸⁵ if, however, both are criminal, then the greater charge is prejudicial.¹⁸⁶ If both are civil, and one charge is lesser, the greater is prejudicial. If the charge should contain both a greater and lesser part, then the greater should be prejudicial,¹⁸⁷ for example, if someone claims a part of a church from you and you claim, instead, the whole church. These charges are called prejudicial which prejudice others.¹⁸⁸

On Compensation¹⁸⁹

Certain charges are customarily either reduced or settled by mutual compensation, for example, if I should ask from you 10 and you from me 10 or I from you 10, and you, from me, 20. But this is so if both parties owed without fixed terms.¹⁹⁰ Indeed, if these are owed unconditionally for a definite period, there is no compensation. Whoever owes unconditionally owes more; whoever owes for a definite period is understood to owe less and, for this reason, whoever claims prematurely is understood as claiming too much.

182 On the *De edendo*'s treatment here of questions (equivalent to petitions), Litewski, *Zivilprozeß*, 322–23 and n. 333. See also *Ordo Bambergensis*, cap. x, xi.

183 Dig. 5.1.29. On this passage in the *De edendo*, comparing also *Ordo Bambergensis*, cap. xi, Litewski, *Zivilprozeß*, 325 and n. 358.

184 On *praeiudicium* and *actiones praeiudiciales*, in general, Litewski, *Zivilprozeß*, 213, 478, also Nörr, *Prozessrecht*, 39–40.

185 Litewski, *Zivilprozeß*, 329 and nn. 392–393, comparing also *Ordo Bambergensis*, cap. xi.

186 Compare Dig. 5.1.54.

187 Inst. 4.6, Gaius, *Commentarius*, 4.44.

188 On prejudicial charges, Litewski, *Zivilprozeß*, 213 and n. 346.

189 Lacking in some manuscripts.

190 On *purus/pure*, Berger, *Encyclopedic Dictionary*, 662.

On Overclaims¹⁹¹

An overclaim takes place in four ways:¹⁹² amount, time, property, location. It occurs by reason of amount when one demands 20 for 10. It happens by reason of time if one should demand before a set day or condition.¹⁹³ It happens by reason of location if one should demand here what ought to be paid at Paris.¹⁹⁴ It is by reason of cause if, for example, I promised you one of two slaves and, though the choice was mine, you demanded the other.¹⁹⁵ In all these, a legal penalty for excessive claim was established. If it were excessively claimed about property and one did not punish him claiming too much before it were argued concerning a false amount, then he shall be defrauded of the entire debt. If he claims too much by reason of place,¹⁹⁶ the nature of the thing, or time, the plaintiff shall be liable to the defendant for threefold what he spent due to the wrongful charge.¹⁹⁷ Much can be said about these questions. However, since charges are accustomed to be interrupted by exceptions, let us consider them.

191 On *pluspetitio* in the post-classical civil law, Mousourakis, *Historical and Institutional Context*, 370 and, especially, Wolfgang Wiegand, *Plus Petitio* (Berlin: Gremer, 1974), 36–42 for the canon law, with reference as well to Placentinus, *Summa Codicis* 3.1, but not to any of the *ordines*. See also Buckland, *A Text-Book of Roman Law*, 707 and Nörr, *Prozeßrecht*, 89 and n. 214. For its treatment in other *ordines*, Litewski, *Zivilprozeß*, 235–37. On the *De edendo* at this point, Landau, “The Origin of Civil Procedure. Treatises in Durham,” 138–39. *Pluspetitio* will be treated at even greater length by the *Ordo Bambergensis*, on which see chapter 5.

192 Inst. 4.6.33. See also C 14 q. 1 c. 2, a text from Augustine. On these conditions, comparing the *Ordo Bambergensis*, cap. xiii, Litewski, *Zivilprozeß*, 235–36 and n. 128.

193 On the discussion of *plus petitio* with respect to time by the contemporary “Tübinger Rechtsbuch,” André Gouron, “Autour de Placentin à Montpellier: Maître Gui et Pierre de Cardona,” *Studia Gratiana* 19 (1976): 350, *rp.* with same pagination in his *La science du droit*, cap. vii.

194 Fowler-Magerl, *Ordo iudiciorum*, 68. See chapter 5 to compare the *Ordo Bambergensis*, which essentially follows this, though without reference to Paris. That this does not mean the *De edendo* was composed there, Gouron, “Un traité écossais,” 9.

195 Compare especially the *Ordo Bambergensis* in chapter 5 below.

196 Treating also the *Ordo Bambergensis*, cap. xiii, Litewski, *Zivilprozeß*, 237 n. 150.

197 Inst. 4.6.33.

Concerning Exceptions¹⁹⁸

It is not only the one who proposes the charge who sues. It also appears that whoever raises an exception also sues, for the defendant in arguing an exception is a plaintiff with the burden of proof.¹⁹⁹ The exception is nothing other than breaking the charge.²⁰⁰ Exceptions are perpetual and peremptory, dilatory and temporary.²⁰¹ Perpetual and peremptory exceptions are those always available in the course of the proceedings and end the trial,²⁰² for example fraud, an obligation taken under fear,²⁰³ a final judgment already given, a transaction, denying debt under oath, or one based on an additional agreement between creditor and debtor that modifies the original, where now the debt could not be claimed in a trial.²⁰⁴ Temporary exceptions are dilatory. These delay the trial, not end it. Examples are the exception of an agreement that the plaintiff would not sue during a set period of time,²⁰⁵ prescription of court, and

198 Jolowicz, *Historical Introduction*, 209: 'An *exceptio* is a clause, the effect of which is to direct the judge not to condemn, even though he finds the *intentio* proved, if he also finds a further set of facts to be true.' See also Helmholz, *The Canon Law*, 323–25.

199 Dig. 44.1.1.

200 Dig. 44.1.2pr.

201 This distinction was first made by Gaius, Inst. 4.120, on which see Mousourakis, *Historical and Institutional Context*, 204 for the early Roman law and van Rhee, "Role of Exceptions," 2 and n. 13. See also Inst. 4.13. In general, Buckland, *A Text-Book of Roman Law*, 656. Comparing here the *Practica legum*, cap. 24, *Olim edebatur actio*, §430–445, and *Ordo Bambergensis*, cap. xii, Litewski, *Zivilprozeß*, 305 n. 98.

202 Litewski, *Zivilprozeß*, 308 and n. 134, comparing *Olim edebatur actio* §444, 449, the added material at the conclusion of the *Practica legum*, and *Ordo Bambergensis*, cap. xii, on which see chapters 4 and 5.

203 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1996), 656–58, discussing also *metus* in connection with *restitutio in integrum* and *exceptio*. For a recent consideration of Johannes Bassianus' understanding of natural and civil obligations, Tammo Wallinga, "Natural Obligations in Bassianus' *Lectura institutionum*," *Revue internationale des droits de l'antiquité*, 3rd. Ser. 58 (2011): 395–410. None of the *ordines* in this study, however, dwell on obligations nor do they make the distinction made by Bassianus. See also below.

204 On the *exceptio pacti*, Jolowicz, *Historical Introduction*, 209, also Nicholas, *An Introduction*, 191.

205 Litewski, *Zivilprozeß*, 304–05 n. 81, comparing the *Practica legum*, cap. 26, on *exceptio pacti*. For the classical law, Berger, *Encyclopedic Dictionary*, 459.

similar ones.²⁰⁶ Any charge annulled by a pact can be revived; however no charge can be revived that was offered by virtue of the law itself.²⁰⁷ All exceptions granted the principal defendant aid those giving surety and the rest obligated on his behalf, unless they are closely related, as a partner, parent, or patron.²⁰⁸ Such close relations are liable to the amount they are able to pay.²⁰⁹ With these persons, one must see to it that they are not destitute.

Generally, all dilatory exceptions ought to be offered at the beginning of the trial. If they are omitted then, they cannot subsequently be entered in opposition to the charge.²¹⁰ The dilatory exception is offered at the beginning of the trial. It is proven when he who offered it, the claimant, has demonstrated his assertion.²¹¹ Perpetual exceptions omitted in the beginning of the case are able to be offered up to the final decision.²¹² Afterwards, one cannot oppose them save through the remedy of appeal,²¹³ since what was not declared to the judge from whom it is appealed can be supplied before the appellate judge. However, if the defendant questions the argument of the plaintiff and does not hesitate to be strengthened by peremptory exception, he is able to place on him the burden of proof and, if he proves his intent, can obtain his exception.

206 Compare Dig. 44.1.3. On peremptory exceptions, Brundage, *Medieval Origins*, 431–32 and n. 80 and, generally, on the *exceptio rei iudicatae*, the exception opposed by the defendant who claimed he had already been sued for the same thing in another court and a judgment had been given, Mousourakis, *Historical and Institutional Context*, 371, Kaser, *Zivilprozeßrecht*, 301–07, Nörr, *Prozessrecht*, 92, 100–01, also Litewski, *Zivilprozeß*, 476 n. 370, comparing Bulgarus. See also *Summa Stephani*, on C 3 q. 6 d.a.c. 2. For a contemporary example of the *exceptio rei iudicatae* invoked in a trial, Müller, *Päpstliche Delegationsgerichtsbarkeit*, 2.135, an act of Archbishop Rotrod of Rouen from 1172–1177, in which Rotrod, as judge-delegate, decides a dispute between Master Radulf of Perrières and William of Landells concerning the church of Noyers-Bocage. See also awareness of the concept, if not the technical term, in the diocese of Gurk by the 1160s, noted by Murauer, *Gerichtsbarkeit*, 1.154.

207 Dig. 2.14.27, stressing the inferiority of the pact to the legal contract.

208 On this distinction from the civil law, which demonstrates the author's familiarity with exceptions, Litewski, *Zivilprozeß*, 315 and nn. 236–237.

209 Dig. 44.1.7 also Dig. 44.4.1.7.1.

210 There was extensive contemporary canonistic discussion, on which see Schlinker, *Litis Contestatio*, 74–75 and n. 65 with reference to Inst. 4.13.8.

211 Cod. 4.19.19. On this, generally, Nörr, *Prozessrecht*, 97–98.

212 Some manuscripts give *peremptoriae* for *perpetuae*. See Cod. 4.1.11.2. In general, Nörr, *Prozessrecht*, 96–97 and Schlinker, *Litis contestatio*, 318–19 on the distinction between dilatory and peremptory exceptions.

213 On *remedium*, Litewski, *Zivilprozeß*, 487, comparing the *Ordo Bambergensis*, cap. iv.

Concerning Prescriptions

Since among the remaining exceptions the prescription of 'longest time' is customarily opposed,²¹⁴ a prescription whose silence lays all charges to rest, it shall not be foreign to our purpose to discuss it. Any prescription of 'longest time' is either for thirty or forty years.²¹⁵ Prescription of 'longest time' has no place in ecclesiastical matters unless for forty years.²¹⁶ The prescription of thirty years, which obtains in private matters, cannot be opposed to the church.²¹⁷ In prescriptions of 'longest time' neither good faith nor just title is required.²¹⁸ These prescriptions were not entered

-
- 214 In general, Cod. 7.39: De praescriptione xxx vel xl annorum. On contemporary canonistic discussion of prescription, see especially the *Summa Stephani*, ad C 16 q. 3 and Helmholz, "Canon Law of Prescription," 273–83 and Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.84–85, with numerous examples. Another comes from Gilbert Foliot, Ep. 66, a letter dating to the late 1140s, and addressed to Archbishop Theobald of Canterbury, on which see Morey and Brooke, *Letters and Charters*, 101. *Longi temporis prescriptio* is mentioned in a dispute over parochial rights. On this section of the *De edendo*, see also Litewski, *Zivilprozeß*, 302.
- 215 Some manuscripts add '100.' On the origins of the claim of a hundred-year prescription by Rome, see above in the introduction to this chapter, also Helmholz, *The Spirit*, 184, with reference to Cod. 1.2.23. On the changing, and increasingly precise, formulation of time in this period, for example, measuring the 'age of the custom,' Laurent Mayali, "Law and Time in Medieval Jurisprudence," in *Grundlagen des Rechts*, 616–17, noting the important role played by Johannes Bassianus.
- 216 Again, see chapter 2 above. Some manuscripts of the *De edendo* add '30.' On forty-year prescription for churches, Nov. 131.6, discussed by Helmholz, *The Spirit*, 184 and "The Canon Law of Prescription," 273–83. Compare also a fragmentary papal letter of unknown date, though certainly twelfth century, preserved in two early decretal collections circulating in the Anglo-Norman world at the same time as the *De edendo*: WH 104 (665). Papal statement that a papal sentence of 40 years' standing could not be retracted except by another pope. (*Collectio Francofurtana* 52, 3). As far as I can determine, this remarkable text has escaped notice. Prescription, a claim to a right based on long, unchallenged, past possession, here reaches 40 years into the future. Roman and canon law, combined in prescription, claim neither tithes nor particular, limited rights, but the law itself. In this letter, prescription takes its place alongside far better-known maxims which contemporaries were also placing in the service of papal legal power, for example *plenitudo potestatis*.
- 217 On the difference between the civil and canon-law prescriptions, see above in chapter 2, also Helmholz, *The Spirit*, 178–85.
- 218 Here the *De edendo* differs from some commentators. For the classical law, compare Cod. 7.39.8.1. For a succinct discussion, Fernand Bernard, *The First Year of Roman Law*, tr. Charles P. Sherman (New York: Oxford University Press, 1906), 225. On *fides* and *bona fides*, in the classical law, Martin Josef Schermaier, "Bona fides in Roman Contract Law," in

on behalf of those in possession but resulted from the impatience of those seeking the property whose claims were being extinguished by the possessor's continual silence.²¹⁹ Only one thing is required: the properties must have been continually possessed without disturbance so that no interruption occurred.²²⁰ Prescription, however, is interrupted in these ways. If by means of a trial called the civil interruption, the prescription shall not be ended until after a period of forty years.²²¹ The conditions of a party remaining silent and the one contesting are not equal. It is also interrupted by detention of the property, which is called natural possession.²²² It is also interrupted by payment of a rent, for example

Good Faith in European Contract Law, ed. Reinhard Zimmermann and Simon Whittaker (Cambridge: Cambridge University Press, 2008), 77–83 on the transition from *fides* to *bona fides*. In the same volume, for the medieval period, James Gordley, “Good Faith in Contract Law in the Medieval *Ius Commune*,” 95–106 for the period before Baldus, though without any consideration of the *ordines*. On good faith and just title in prescription, see above in the introduction to this chapter. That Gratian, like our author, assumed that good faith would not be necessarily present, Helmholz, *The Spirit*, 189. This requirement, along with possession of just title, again a point where the *De edendo* deviates, would be remedied by decretals of Alexander III and the IV Lateran Council. Finally, for an older, extensive discussion of twelfth-century canon and civil law, though not taking the *ordines* into account, Karl Hildebrand, “Geschichte der Bestimmungen des canonischen Rechtes über die bona fides bei der Ersitzung und Klagverjährung,” *Archiv für die civilistische Praxis* 36.1 (1853): 27–49.

219 On *perpetua taciturnitate* see, for example, a letter of Pope Leo IX, (Reg. 2376, JL 4188), preserved as one of the constitutions of Emperor Henry III in *Constitutiones et acta publica imperatorum et regum*, vol. 1. ed. Ludwig Weiland, (Hannover: Hahnsche Buchhandlung, 1993), 98. On *silentium* in Roman law, which could mean, for example, tacit agreement, Berger, *Encyclopedic Dictionary*, 707 also, in general, Stefan Tobias Schwartz, *Qui tacet, consentire videtur—eine Rechtsregel im Kommentar. Vorläufer in kanonistischen Brocardasammlungen und zeitgenössische Kommentierung* (Paderborn: Schöningh, 2003), and Gordley, “Good Faith,” 103–04 on tacit obligations. On the silence (*taciturnitas*) of a prelate not creating an obligation, possibly the meaning intended here, see a letter of Gregory I, preserved at x 2.26.2 On the distinction between tacit and express conditions, see also André Gouron, “Conditio probosa et spernenda,” in *De iure canonico*, 181, discussing an unnamed glossator “R” opposed by the *Distinctiones Monacensis*.

220 On *interruptio*, Berger, *Encyclopedic Dictionary*, 515, noting Cod. 7.40. The *De edendo* may be compared here with Rogerius, *De diversis praescriptionibus*, PL 146.1494D–1495B.

221 Compare Cod. 7.40.2.1.

222 On *detentio* and *possessio naturalis*, Berger, *Encyclopedic Dictionary*, 433, treating ‘simple holding of a thing without possession.’ See also Cod. 7.39.7.5 and compare William of Cabriano, *Casus Codicis*, 542. On the distinction in the *De edendo* here between *possessio* and *detentio*, Litewski, *Zivilprozeß*, 292 and n. 215.

when one pays a rent one time for a property during those thirty years.²²³ It is also interrupted by a charge made through an executor,²²⁴ so that that if something like this should intervene, the prescription of 'longest time' could not be opposed. Thus, it suffices to have discussed prescriptions as they apply to modern usage.²²⁵

Concerning Advocates

Since we have come to the trial's beginning and litigation, we should consider advocates, who provide assistance and are necessary for the parties.²²⁶ It shall be necessary in the following to discuss them. Advocates argue on behalf of others. They either argue their own claim, set forth that of their friend before a judge, or contradict another's claim.²²⁷ Advocates who destroy the ambiguous facts of cases and, striving with the force of their defense in both public and private affairs, restore the weary, raise up the fallen, and provide for the human race no less than if they saved their country and parents from wounds and battles.²²⁸ Those with shields, swords, and amour are not the only ones who fight, for patrons of cases do so as well. Relying upon the defense of glorious peace, they defend the hope of the suffering, their lives, and posterity.²²⁹ When

223 For *pensio*, a rent or installment payment, Berger, *Encyclopedic Dictionary*, 625. The term appears in a decretal of Alexander III to Bishop Gilbert Foliot of London and Bishop Roger of Worcester concerning the church of Lincoln (JL 14001, x 2.24.10). On this decretal, Cheney, *Roger, Bishop of Worcester*, 353–54, and Landau, "Rechtsfortbildung," 75, discussing why reason of necessity might allow one to not fulfill a promissory oath.

224 On the executor, Nörr, *Prozessrecht*, 21, also Litewski, *Zivilprozeß*, 259 n. 457, and Müller, *Päpstliche Delegationsgerichtsbarkeit*, 1.113–14 on the *executor iudicum*.

225 Helmholz, "The Canon Law of Prescription," also Müller, *Päpstliche Delegationsgerichtsbarkeit*, 1.84–85 on the period of 30 years and, generally, the discussion above in chapter 2.

226 Cod. 2.6.6.1.

227 Dig. 3.1.1.2. On *amicitia*, friendship, whose patronage networks were vitally important in litigation, whether Roman or medieval, and, in the latter, a way to restore or preserve power relations in the ending of disputes though 'friendly accord,' Keyser, "Agreement Supersedes," 82.

228 On such praise, Litewski, *Zivilprozeß*, 176 and n. 7, contrasting also a negative comment in the *Ordo Bambergensis*, cap. vi.

229 Cod. 2.7.14. The text appears in both contemporary and earlier sources, for example a sermon of Peter Damiani, PL 255.563, on which see Pennington, "Roman Law and the Papal Curia," 234–35 and n. 7, and Brundage, *Medieval Origins*, 170. On such martial imagery describing advocates and the law, R.I. Moore, *The First European Revolution*,

offering assistance to the litigants, let advocates, no more than the utility of the case requires,²³⁰ not be rash when arguing,²³¹ plead what the case demands, and refrain from injury. If they neglect their charge, they must not be given license to become involved either openly or, by deception, in the conflicts between adversaries.²³² Whoever wishes to be a *causidicus*²³³ may not be both advocate and judge in the same case.²³⁴

The duty of the judge is to furnish advocates to those who do not have them.²³⁵ The judge ought to show this humanity to him who, due to certain reasons, either from the ambition of his adversary or fear of him, did not find a defender.²³⁶ If in a trial,²³⁷ one advocate, having a better reputation, supports one party while the another advocate, untrained and less skilled, the other, it shall be the duty of the judge to provide aid to each party so that there may be an equal distribution of advocates.²³⁸ If one of the parties should be discovered to have treated separately with several advocates and thus had taken from his adversary's equal defense,

c. 970–1215 (Oxford: Oxford University Press, 2004), 170. *Patronus* was commonly used for advocates, Litewski, *Zivilprozeß*, 177 n. 14, comparing *Olim edebatur actio* §329 and *Ordo Bambergensis*, cap. viii.

230 Litewski, *Zivilprozeß*, 366 and n. 178. Only the *De edendo* makes this point.

231 Literally “destroy temerity in the spirit of arguing.”

232 This is collusion. See above, Cod. 2.6.6. On the lawyer's ethics, Litewski, *Zivilprozeß*, 181, and n. 85, comparing Bulgarus, *Olim edebatur actio* §329, and *Ordo Bambergensis*, cap. viii.

233 Another word for *advocatus*, on which see Berger, *Encyclopedic Dictionary*, 383, also Litewski, *Zivilprozeß*, 177 n. 17. The term is not used by our other *ordines*. On *iudex* and *causidicus*, Johannes Fried, *Die Entstehung des Juristenstandes im 12. Jahrhundert. Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena* (Cologne and Vienna: Böhlau Verlag 1974), 24–45.

234 Cod. 2.6.6pr, Cod. Th. 2.10.5 and Brundage, *The Medieval Origins*, 30 n. 102 and 188 n. 72. For the *De edendo* here, Litewski, *Zivilprozeß*, 111 n. 492.

235 Franck Roumy, “Le développement du système de l'avocat commis d'office dans la procédure romano-canonique (xii^e–xiv^e siècle),” *TRG* 71 (2003): 359–86, though not considering the *De edendo* or the other *ordines* treated in this study. He notes various classical texts, above all a Constitution of Valentinian I and Valens from 370 (compare also C 3.7.2 §12–14) preserved at Cod. 2.6.7.

236 Dig. 3.1.4. The other *ordines* in this volume do not treat this, on which see Litewski, *Zivilprozeß*, 178 n. 41. On accusation as a tactic to pressure an adversary, Müller, *Päpstliche Delegationsgerichtsbarkeit*, 1.228–29.

237 Some manuscripts give *in uno adiutorio*.

238 Cod. 2.6.7.1. See Brundage, *The Medieval Origins*, 33 n. 116 and 188 n. 72. On glosses to this passage in the *De edendo*, Nörr, *Zur Stellung*, 27 n. 50.

let him know that he has contributed to an iniquitous trial and deceived the authority of the judge.²³⁹

If any one should judge that his patron has colluded with others, let him prove the accusation, and (if proven) a sentence against the patron shall not be lacking due to the temerity of the case. The patron shall be questioned again about the reason.²⁴⁰ What advocates argue on behalf of those whose case is being tried must be considered as if offered by the parties themselves,²⁴¹ unless challenged within the next three days.²⁴² The errors of those arguing for others cannot prejudice the truth.²⁴³

Concerning Forms of Proof²⁴⁴

Since litigants must now be instructed concerning the forms of proof, and we are considering the trial to be prosecuted, it is necessary to treat them here.²⁴⁵ Some delay must be provided in order, mainly, to search for evidence. Nevertheless, the decision to give this delay is not granted

239 Cod. 2.6.7.3. See also a decretal of Alexander III (JL 13980, x 2.21.4), discussed by Brundage, *The Medieval Origins*, 326 and n. 134. On compelling witnesses to testify, Nörr, *Prozessrecht*, 134–35.

240 Cod. 2.7.1. On *praevaricatio*, Brundage, *The Medieval Origins*, 30–31 for the classical civil law and 185–186 for the twelfth-century, also Nörr, *Prozessrecht*, 35 and, for the *De edendo* here, a point not made in the other *ordines* in this study, Litewski, *Zivilprozeß*, 184 and n. 141. Our treatise's understanding of *praevaricatio*, however, was shared by others. Kantorowicz, *Studies*, 19 calls attention to a definition provided by his "Master G," who, commenting on Dig. 48.16.1.1 s.v. *Praevaricari*, gives 'Praevaricari est uera crimina scienter intendere.' The *De edendo* similarly emphasizes intentional deception. A general treatment of the lying judge is provided by Laurent Mayali, "Entre idéal de justice et faiblesse humaine; le juge prévaricateur en droit savant," in Henri Vidal, ed. *Mélanges Henri Vidal* (Montpellier: Faculté de droit d'économie et de gestion, 1994), 91–104, though without consideration of the *ordines*.

241 Cod. 2.9.1.

242 Cod. 2.9.3.

243 Cod. 2.9.2.

244 An interesting comparison can be made here with a contemporary Italian *ordo* on proof, 'Pro utraque parte' which, unlike the essentially civilian *De edendo*, draws upon canon law, including the pre-Gratian *Collectio Polycarpus*. See most recently Bruce C. Brasington, "Crimina que episcopis inpingere dicis: The Contribution of the *Collectio Polycarpus* to an Early *Ordo Iudiciorum*," in *Readers, Texts, and Compilers*, 123–35.

245 The order followed by the *De edendo* is one of many approaches taken to outline the forms of proof, on which see Lévy, *La Hiérarchie*, 24 and n. 12.

to judges until a most urgent reason is pressing or because the necessity of the litigants' instruction requires it.²⁴⁶ When granted, proper cause is given. Therefore, if proof is requested from the same province where the case is being tried, a delay of three months ought to be granted; (if it is requested) from a neighboring province, six months and, if overseas, nine months.²⁴⁷ This delay is not easily given more than once in pecuniary cases. Nevertheless, should something unforeseen arise, one grants it a second time. In capital cases, however, three delays are granted the defendant, and two to the accuser. In both, just cause must be examined.²⁴⁸

If anyone possessing immoveable property on another's behalf should be sued, he ought to name the principal of the charge immediately before the court so that, whether he lives in the same city or far off in another province, word may be sent within a set number of days determined by the judge,²⁴⁹ so that either the principal himself or his proctor may come to counter the plaintiff's charge.²⁵⁰ If, however, after the time granted in this fashion he fails to appear, the judge should not hesitate to place the plaintiff in possession, with all allegation concerning the principal question reserved to the absent party.²⁵¹ These delays were adopted for the sake of utility. Indeed, there is no serious damage in a moderate delay.²⁵² Yet, the shortest time is not appropriate; rather, it is a period of moderate duration, so that documents may be examined through which the good faith of the truth may be elicited and the veracity of the questions investigated.²⁵³

Accordingly, let all know that they ought to bring that case to public notice, strengthened by chargeable witnesses, proved by valid documents

246 Cod. 3.11.2. 2. Gratian also cites this at C 3 q. 3 d.p.c. 4.

247 Cod. 3.11.1. On this text in the *De edendo*, Litewski, *Zivilprozeß*, 366 and n. 181, 367 n. 192. See also *Ordo Bambergensis*, cap. iii.

248 Dig. 2.12.10.

249 Litewski, *Zivilprozeß*, 276.

250 Cod. 3.19.2.

251 Cod. 3.19.2.1.1. On allegations, generally, Nörr, *Prozessrecht*, 177–78.

252 Dig. 5.1.21. On this, Brundage, *The Medieval Origins*, 286 and n. 8.

253 Compare a letter of Gregory the Great (JE 1757) preserved at X 2.19.1. On the examination of documents, generally, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.89–90 and 2.101, for a good example from an act of 1149 from Archbishop Hugh of Rouen describing how the case of Abbot Richard of Troarn was 'fortified by documents and adequate testimony.' Compare our text here also with William of Longchamp's extensive treatment in chapter 4.

or revealed to be true, with manifest proofs clearer than light itself.²⁵⁴ It is a most certain rule of law that merely offering testimony, unsupported by other, valid evidence, has no effect.²⁵⁵ The burden of proof falls on him who sues, not on the one who denies.²⁵⁶ One fears in vain that proof be required from the defendant.²⁵⁷ Follow the legal order when claiming what is yours. The necessity of proving that these possessions belong to him does not fall to the possessor, since ownership shall remain with him if you fail to prove your claim.²⁵⁸ The possessor is not compelled to produce the title of his possession to one requesting it.²⁵⁹ By declaring he cannot prove what he had asserted, the plaintiff does not oblige the defendant to prove or demonstrate the contrary, since by the nature of things he who denies cannot provide a proof.²⁶⁰ Personal documents or private testimony alone do not suffice without other legitimate proofs.²⁶¹ In civil, as well as criminal cases, witnesses are able to be summoned.²⁶²

-
- 254 Cod. 4.19.25. On a gloss here to the *De edendo* that refers the reader to presumptions, see Rudolf Motzenbäcker, *Die Rechtsvermutung im kanonischen Recht* (Munich: Kommissionsverlag Karl Zink, 1958), 69. For more on presumptions, see chapter five for the *Ordo Bambergensis*.
- 255 Cod. 4.20.4. As noted above in the introduction, the text here is close to the *Brachylogus*. See also C 4 q. 2/3 c. 3 §. 32. On invalid decisions, Litewski, *Zivilprozeß*, 468, also n. 245, comparing *Ordo Bambergensis*, cap. xxi.
- 256 Dig. 22.3.2. In general, Kaser, *Zivilprozeßrecht*, 403 n. 13, Litewski, *Zivilprozeß*, 362, and Brundage, *The Medieval Origins*, 153 and n. 96. For the maxim in the older Lombard law, Radding and Ciaralli, *The Corpus Iuris Civilis*, 183. See also Nörr, *Prozessrecht*, 127–28. Compare above in chapter 2 for Bulgarus, and also C 6 q. 5 c. 1 and d.p.c. 1. This echoes Dig. 22.3.9. Compare also the *Ordo Bambergensis*, cap. xii and xvi.
- 257 Cod. 4.19.8.
- 258 Cod. 4.19.2.
- 259 Cod. 3.31.11.
- 260 Cod. 4.19.23. Compare also Bulgarus. On the need for affirmative proof in both the civil and canon law, Helmholz, *The Ius Commune*, 113. See also C 6 q. 4 c. 7, and the *Summa Elnonensis*, itself dependent on both Placentinus and the *Summa Parisiensis*. On these, Fransen, “Colligate Fragmenta,” 105–06.
- 261 Cod. 4.19.5. On public and private instruments in the post-classical law, Mousourakis, *Historical and Institutional Context*, 370. See also Nörr, *Prozessrecht*, 157–58 and, for the *De edendo* here, Litewski, *Zivilprozeß*, 423 and nn. 1013–1014, comparing also the *Ordo Bambergensis*, cap. xvi.
- 262 Dig. 22.5.1.1.

Concerning Witnesses²⁶³

Recourse to witnesses is both necessary and common and one should seek especially a witness whose good faith is not suspect.²⁶⁴ One must examine his good faith, seriousness, character, and dignity;²⁶⁵ also, one must investigate his circumstances and fortune, for example whether he is noble or common, of honest and proven life, or guilty and dishonest, of good reputation or infamous,²⁶⁶ wealthy or poor, whether he would easily testify for the sake of profit, or is friends with the person for whom he is testifying or, conversely, his enemy.²⁶⁷ It is difficult to relate all the things one must examine concerning witnesses. Sometimes one must consider their dignity,²⁶⁸ at other times, their authority. Sometimes the public reputation of the witness confirms the validity of the reason why he is being questioned.²⁶⁹

No one can legally be a witness in his own case.²⁷⁰ One cannot produce a witness who has testified already against the defendant.²⁷¹ It is not fitting that witnesses be interrogated whom the accuser produced from his own household.²⁷² It is unquestionably the law that he who,

263 For comparison with Gratian's treatment of witnesses, Fillippo Liotta, "Il testimone nel Decreto di Graziano," in *Proceedings Toronto*, 81–95.

264 Dig. 22.5.1pr. This text is also used by the *Ordo Bambergensis* when discussing witnesses, on which see chapter 5.

265 Dig. 22.5.2. One can compare the *De edendo* here with Bulgarus' discussion in his letter to Haimeric. See also Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.91–92, Mausen, *Veritatis adiutor*, 508–09, and Wickham, *Courts and Conflict*, 133.

266 Mausen, *Veritatis adiutor*, 482 and nn. 342, 487 and n. 368.

267 Dig. 22.5.3pr. Compare C 4 q. 2/3 c. 3 §. 1, 2. The *exceptio contra personam* would be raised to challenge the chargeability of a potential witness, on which see Nörr, *Prozessrecht*, 138–39 and Mausen, *Veritatis adiutor*, 544 and n. 609.

268 Mausen, *Veritatis adiutor*, 667 and n. 216, comparing also Cod. 4.20.9 and C 4 q. 2/3 c. 3§37.

269 Dig. 22.5.3.2, comparing also C 4 q. 2/3 c. 3 §28. On *fama publica* in canonistic process, Richard H. Helmholz, "Discipline of Clergy: Medieval and Modern," *Ecclesiastical Law Journal* 30.6 (2002): 191 and n. 12, also Nörr, *Prozessrecht*, 165–67 and, for the *De edendo* here, Litewski, *Zivilprozeß*, 443.

270 Dig. 22.5.10. On the exclusion of witnesses in later canon law, generally, Nörr, *Prozessrecht*, 136–37 and Litewski, *Zivilprozeß*, 393 n. 551, comparing also the *Ordo Bambergensis*, cap. xv.

271 Dig. 22.5.23. See Litewski, *Zivilprozeß*, 394 n. 575. This point is not made in the other *ordines* treated in this volume.

272 Dig. 22.5.24, on which see Mausen, *Veritatis adiutor*, 548 and n. 621, comparing the *Ordo Bambergensis* as well.

having produced witnesses, obtained from them once or twice testimonies or initiated a dispute, cannot subsequently produce new witnesses.²⁷³ Though witnesses may be compelled to testify, they nevertheless ought not be called inconsiderately to undertake a lengthy journey.²⁷⁴ Whether in major cities or in the provinces judges, if they deem it fitting when witnesses reside elsewhere, ought to send the litigants or their proctors there where the trial may more easily be conducted and, if required in other places to show good faith by means of proven evidence,²⁷⁵ they may be permitted to testify by these means, if requested.²⁷⁶ Let not orphans, widows, those burdened by lengthy illness, the elderly and weak be compelled to cross the boundaries of their provinces; rather, they should have the opportunity to litigate in the province where their witnesses reside and their documents are located.²⁷⁷ Witnesses who can be commanded to testify are not suitable.²⁷⁸ It is established that witnesses ought to be bound by taking an oath before they offer testimony,²⁷⁹ so that their good faith may be considered by the more powerful and respectable.²⁸⁰ Where there are not many witnesses, two suffice.²⁸¹ It is obvious that the

273 Nov. 90. 1. On the *productio testium*, Nörr, *Prozessrecht*, 122, 132–33, also Litewski, *Zivilprozeß*, 398–99, and Loschiavo, “La Riforma Gregoriana,” 165. That this novel broke with the earlier Roman law’s concern for the witnesses being present to testify, Hermann and Speer, “Facing the Accuser,” 491–92, describing its provision as resembling a deposition. They also trace the reception of the novel in subsequent canon law through Pope Gregory the Great’s *Commonitorium*, which influenced subsequent writers such as Hincmar of Rheims. On this novel’s importance in twelfth-century decretals treating procedure, Nörr, “Päpstliche Dekretalen,” 60.

274 Dig 22.5.3.6. On this passage in the *De edendo*, Litewski, *Zivilprozeß*, 406 n. 776, also comparing the *Olim edebatur actio*, §399, 422, and Mausen, *Veritatis adiutor*, 101 and n. 248. The other *ordines* in this study do not treat this point.

275 A manuscript provides ‘prolatis’ (‘with evidence presented.’)

276 Compare Cod. 4.21.18.

277 Cod. 3.14.

278 Dig. 22.5.6, also Cod. 4.20.5, received by Gratian at C 4 q. 2/3 c. 3§33, on which see Mausen, *Veritatis adiutor*, 545 and n. 612.

279 Mausen, *Veritatis adiutor*, 195.

280 Cod. Th. 11.39.3pr. Compare also C 4 q. 2/3 c. 3.

281 Dig. 22.5.12, also C 4 q. 2/3 c. 3 §26. On the rule of two, Litewski, *Zivilprozeß*, 411 n. 851, comparing also the *Ordo Bambergensis*, cap. xv and *Olim edebatur actio*, §407–408. See also Mausen, *Veritatis adiutor*, 702 and n. 111 and 699 and n. 91.

response of a single witness may not be heard,²⁸² though he might glitter with some special honor.²⁸³

Concerning Privileges

Since privileges also support the parties, it is thus appropriate to speak about them and, on their account, rescripts.²⁸⁴ All rescripts proceeding from any judge ought to be offered, provided that the requests shine with the truth.²⁸⁵ Otherwise, they are not valid.²⁸⁶ If two should request a rescript in a common case, though it be directed to one person, nevertheless it is intended for both.²⁸⁷ Original requests and authentic rescripts,²⁸⁸

282 Litewski, *Zivilprozeß*, 411 n. 862, noting numerous *ordines*, among them *Ordo Bambergensis*, cap. xv, xvi and *Olim edebatur actio*, §408.

283 Cod. 4.20.9 also C 4 q. 2/3 c. 3. §. 38.

284 On the evolution of imperial rescripts from the fourth century onwards, Schrage, "Utrumque ius," 85–86.

285 Cod. 1.23.7pr. That the phrase *si preces veritate nituntur* was required for a valid document, Classen, "Spättrömische Grundlagen," 72. See also Litewski, *Zivilprozeß*, 55 7–58 n. 147, noting that it also appears in *Olim edebatur actio* §562 and the *Ordo Bambergensis*, cap. xxi, as well as in other *ordines*. On contemporary civilian discussion of this phrase, for example by Johannes Bassianus, as well as its treatment in a decretal of Alexander III, André Gouron, "La notion de privilège dans la doctrine juridique du douzième siècle," in *Das Privileg im europäischen Vergleich*, 2 vols., ed. Barbara Dölemeyer and Heinz Mohnhaupt (Frankfurt am Main: Klostermann, 1996), 2.12–13, rp. with same pagination as cap. xviii in his *Pionniers du droit occidental au Moyen Âge*.

286 Cod. 1.23.7. Interestingly, Bulgarus did not comment on rescripts. On this passage in the *De edendo*, Schrage, "Utrumque ius," 85, also Litewski, *Zivilprozeß*, 553 and n. 72, comparing both *Olim edebatur actio* §218, 548 and the *Ordo Bambergensis*, cap. xxi. For comparison with Placentinus at this point, see above. Compare also two letters of Gilbert Foliot, Ep. 128 (from 1155–1157) to Archbishop Roger of York and Ep. 248 (from 1163–1181) to Pope Alexander III, on which see Morey and Brooke, *The Letters and Charters*, 167, 320, also Taliodoros, "Law and Theology," and Nörr, "Päpstliche Dekretalen," 59 commenting on how frequently Alexander treated rescripts, delegation of judges, and other procedural matters in which the pope was personally involved.

287 Cod. 1.23.1. On multiple plaintiffs or defendants, Litewski, *Zivilprozeß*, 154–55, also n. 148, comparing also *Ordo Bambergensis*, cap. xviii, and *Olim edebatur actio* §516. The other *ordines* in this study do not take this line.

288 Litewski, *Zivilprozeß*, 559 and n. 168, comparing also the *Practica legum*, cap. 16, and *Olim edebatur actio* §218, 220, also 559 n. 172, that the *De edendo* requires the original of the request, something not discussed in the other *ordines*.

not copies, should be placed first before the judges.²⁸⁹ All rescripts found without a date or consul shall lack authority.²⁹⁰ It is unquestionably the law that rescripts elicited illegally are invalid.²⁹¹ Rescripts containing privileges, though requested against the law for the sake of public utility, shall be preserved.²⁹² However, those things granted in certain chapters (rescripts), save in individual cases, do not stand firmly against the law.²⁹³

On Swearing Oaths

Since often lack of proof troubles the litigants, one discovered a legal aid common to nearly all cases: swearing oaths.²⁹⁴ Thus, let us now discuss it here. The rule of swearing oaths was found to be the greatest remedy for trying disputes.²⁹⁵ Therefore, let us see how it should take place and what its force and power should be. An oath is sworn either willingly by the parties or by the authority of the judge.²⁹⁶ If willingly taken by the parties, it is called a voluntary oath.²⁹⁷ If taken by the authority of the

-
- 289 Cod. 1.23.3; compare also C 25 q. 2 c. 16.
- 290 Cod. 1.23.4. Compare C 25 q. 2 c. 16. On the *De edendo* here, Litewski, *Zivilprozeß*, 557.
- 291 Cod. 1.19.7. Compare also C 25 q. 2 c. 15.
- 292 Cod. 1.22.0. Noting this exception in the *De edendo*, Litewski, *Zivilprozeß*, 557 and n. 145.
- 293 The classical law was concerned that a privilege granted an individual not be extended as a general rule. While the text cited here is not certain see, for example, Inst. 1.1.2.6, which had also been cited by Ivo of Chartres, Brasington, *Ways of Mercy*, 141.
- 294 Litewski, *Zivilprozeß*, 430 and n. 1104, comparing also Bulgarus and the *Ordo Bambergensis*, cap. xx.
- 295 Comparing here *Bulgarus, Olim edebatur actio*, §489, and the *Ordo Bambergensis*, cap. xx, Litewski, *Zivilprozeß*, 431 and n. 1108.
- 296 Dig. 12.2.1. On this, Lévy, *La Hiérarchie*, 137 and n. 3 and the *Ordo Bambergensis*, cap. xx.
- 297 Lévy, *La Hiérarchie*, 138 and n. 9, noting also Bassianus, *Liber*, §494. On Bassianus' procedural treatise, see Johannes Bassianus: *Libellus de ordine iudiciorum*, in *Bibliotheca iuridica medii aevi*. (Bologna: In aedibus Societatis Azzoguidianae, 1888–1901, 2nd ed. Bologna: Angelo Gandolfo, 1913, rp. Turin: Bottega d'Erasmus, 1962). In general, Lang, *Römisches Recht im Mittelalter*, 224, and Coing, *Handbuch*, 137 for discussion of him as Vacarius' possible successor in England. Additional studies include, also, in general, Charles Donahue, Jr., "Bassianus, that is to say Bazianus? Bazianus and Johannes Bassianus on Marriage," *Rivista internazionale di diritto commune* 14 (2003): 41–82, André Gouron, "A la convergence des deux droits: Jean Bassien, Bazianus et Maître Jean," *TRG* 59 (1991): 319–32, rp. in his *Droit et coutume en France aux XII^e et XIII^e siècles*. Among other works, Laurent Mayali, "Johannes Bassianus—Nachfolger des Vacarius in England?," *ZRG RA* 89 (1982): 317–25 and Fowler-Magerl, *Ordo iudiciorum*, 108, noting that Bassianus was in Bologna

judge, is called a judicial or necessary oath.²⁹⁸ The voluntary oath differs from the necessary in both force and power.²⁹⁹ If delivered by a judge, it cannot be rescinded, since he declared the sentence to himself and one shall not be allowed to question him about perjury in this.³⁰⁰ It is enough that he awaits God's punishment.³⁰¹ If anyone vowed with neither the judge nor his opponent tendering,³⁰² it has no benefit for, indeed, he only swore to himself.³⁰³

One must define the quality of the oath given for the judge's consideration. An oath tendered can be revoked; whoever revokes it shall not be able to have recourse to tendering the oath.³⁰⁴ Whoever tendered the oath shall not be able to appeal if he vowed to whom it was tendered, not even if he recused the oath retendered to him, unless it was a venerable person who tendered and a common person who retendered.³⁰⁵ It is necessary to assume or retender an oath having been tendered. It is manifestly disgraceful and a sign of guilt neither to assume nor retender the tendered oath.³⁰⁶ For swearing the oath is both the disputing and settling of all trials.³⁰⁷ This is what may be said about litigants, their advocates, and their evidence. Next we consider the duty of the judge. Yet, since agreements in many forms precede judgment, these ought generally to be treated first.

until 1187 and may have then gone to England and died there. His works were known in England in the 1190s, on which see Taliadorus, *Law and Theology*, 46, Landau, "The Origins of Legal Science," 167 and Otte, "Logische Einteilungstechniken," 165. Finally, on Bassianus and the *Authenticae*, Pennington, "The *Authenticae*," 46.

298 Cod. 2.0. See Helmholz, *The Ius Commune in England*, 129.

299 On oaths, both voluntary (lacking legal force) and required by the judge, Litewski, *Zivilprozeß*, 431.

300 Litewski, *Zivilprozeß*, 433 and nn. 1137, 1141, comparing also *Olim edebatur actio*, §494.

301 Compare Cod. 4.1.2.

302 On the *iurisiurandum necessarium*, where the plaintiff tendered an oath to the defendant that he denied a debt in a fixed sum, Berger, *Encyclopedic Dictionary*, 534.

303 Dig. 12.2.3.

304 Cod. 4.1.11pr. See Litewski, *Zivilprozeß*, 434 on this section in the *De edendo*, comparing it at various points with *Olim edebatur actio*, §493 and, especially, the *Ordo Bambergensis*, cap. xx.

305 Perhaps 'venerable,' the archaic language of late antiquity, would have been understood as 'noble.'

306 Dig. 12.2.38.

307 Compare Heb. 6.16.

On Pacts³⁰⁸

One calls it a pact because it is like an act of peace.³⁰⁹ It is legally established that pacts made against the laws and good customs are invalid.³¹⁰ Pacts containing a base reason must not be observed, for example, if I agreed that I would not sue for theft or injury, for it is truly fitting to fear the penalty for theft and injuries.³¹¹ Though it may give rise to an exception, a simple pact does not produce a legal charge.³¹² However, a simple agreement relies on the support of no one.³¹³ ‘Clothed’ pacts are clad six ways: cause, orally, writing, form, content, continuance.³¹⁴ They are clad by cause when something is promised for cause; orally, as in a stipulation,³¹⁵ in writing, for example if I wrote down that I owed something; by form, when a contract was made, as in buying and selling; in content, when the law confirms the agreement, as in a pact of donation

308 The earlier edition does not treat this as a separate section. Comparing this with Placentinus and, also, its divergence from *Olim edebatur actio*, Gouron, “Qui a écrit,” 73 and “Un traité écosais,” 8.

309 Compare Isidore of Seville, *Etymologiarum*. 5.24.18.

310 Cod. 2.3.6. On custom as understood by the glossators, among many studies, John P. Dawson, *The Oracles of the Law* (Ann Arbor: William S. Hein, 1986), 128–34. Dawson notes that commentators struggled with the classical law’s insistence on the superiority of imperial rule and statute over local custom in light of the diversity and vitality of local custom in the towns and cities of their own day. Eventually, he notes, they adopted an ‘extraordinarily favorable’ view towards custom, provided there was no clear, specific conflict with the *Corpus iuris civilis*. It is also surprising that, as important and sometimes vexing as custom was to twelfth-century jurists, none of our *ordines* has a section devoted to it.

311 Dig. 2.14.27.4. See also Dig 12.5.1. On the *conditio ob turpem causam* treated by the *Summa Trecensis*, Kantorowicz, *Studies*, 155.

312 Dig 2.14.7.4. Compare also Cod. 2.3.10 and its treatment by William of Cabriano, in Wallinga, *Casus Codicis*, 41.

313 On *pacta nuda* and *vestita*, Zimmerman, *The Law of Obligations*, 537–40, also Kantorowicz, *Studies*, 210–11 on the canon law’s influence on civilian thought, and Landau, “Pacta sunt servanda,” 763 and n. 12, and 781, noting that the distinction between *pactum* and *pactum nudum* had been made by Bolognese glossators; the subsequent distinction of *pactum vestitum* comes from here in the *De edendo*. For techniques of distinctions among the early civilian glossators, Otte, “Logische Einteilungstechniken,” 157–70, though without consideration of the *ordines*.

314 For comparison with Placentinus at this point, see above.

315 Unlike Bulgarus, our author does not consider the problem of *turpitude* in stipulation.

and a promise to promise to pay an established debt;³¹⁶ continuance, when a pact precedes or follows a contract without interruption.

Concerning Transactions³¹⁷

A transaction is a type of pact containing something particular, and thus it must be treated specially. A transaction is transition (from a) charge.³¹⁸ Whoever settles, passes from the dispute: that is to say, he withdraws. Therefore, a transaction is particular agreement concerning a doubtful dispute and an uncertain matter when something has been given, promised, or retained. A transaction does not obtain when nothing has been given, promised, or retained.³¹⁹ In every civil question, one is commonly permitted to settle. It is permissible to settle in criminal cases which demand the capital penalty,³²⁰ save the crime of adultery.³²¹ In those crimes which do not carry the penalty of blood, one is not permitted to settle by means of a transaction, save in the crime of falsification.³²² Transaction does not obtain lesser legal authority than a

316 Berger, *Encyclopedic Dictionary*, 410, 625.

317 The *De edendo* provides the most extensive discussion of this by any of the *ordines* considered in this volume. See also Litewski, *Zivilprozeß*, 451–54.

318 This ‘extrajudicial agreement’ enabled litigants to settle without a trial. See Cod. 2.4. *Transactionibus*, treated in the *Summa Trecensis*, 2.4, 2–9. On the considerable contemporary discussion of the term, Nörr, *Prozessrecht*, 101, Fowler, “Forms of Arbitration,” 137–38, and Bruce C. Brasington, “From Charitable Sentences to Amicable Settlements: A Note on the Terminology of Twelfth Century Canon Law,” in *Aspects of Charity. Concern for One’s Neighbor in the Medieval Vita Religiosa*, ed. G. Melville (Berlin, Münster, Vienna: LIT Verlag, 2011), 1–10, noting also the related phrase *amicabilis compositio*. For more on this, Müller, *Päpstliche Delegationsgerichtsbarkeit*, 1.101–02. Muraier, *Gerichtsbarkeit*, 64–78, 156, especially 69–72 considers Alexander III’s forbidding transactions for benefices because of the threat of simony. See also Wilfried Stelzer, *Gelehrtes Rechts in Österreich. Von den Anfängen bis zum frühen 14. Jahrhundert* (Vienna: H. Böhlau, 1982), 65–66. For a representative example, see a Cistercian cartulary, *Cartulaire de l’abbaye Notre-Dame des Vaux-de-Cernay, de l’ordre de Cîteaux, au diocèse de Paris*, ed. Lucien Merlet and Auguste Moutié, (Paris: Henri Plon, 1857–1858), 185.

319 Cod. 2.4.38.

320 Literally “penalty of blood.”

321 Cod. 2.4.18. On the canonistic understanding of crime, Kéry, “Canon Law and Criminal Law,” 413–16, though without reference to the *ordines*.

322 See above, Cod. 2.4.18.

decision rendered in court.³²³ It is an untrustworthy and fickle man who sues against his own pacts.³²⁴

If a man older than twenty-five attempts to sue against pacts and settlements which, having invoked the name of Omnipotent God and compelled by no power, he previously affirmed by solemn vow, (but now) pressing judges, petitioning powerful men, or not fulfilling promises,³²⁵ he is not only marked by infamy but also prevented from suing. With the penalty restored which is entered in pacts, let him forfeit the property which was the matter of the trial and be deprived of the profit which resulted from the pact. All these pass to him who preserved the rights of the pact without defilement.³²⁶ If settlements by means of transaction had been extorted by means of false documents, though a legal oath subsequently intervened, they must be retracted when the falsehood is revealed.³²⁷ The contract must not stand when it resulted from deception.³²⁸

Concerning the Office of Judge³²⁹

Since we were to speak above about the office of the judge unless some suitable subject needed consideration first, thus now this question should be treated here.³³⁰ The duty of the judge is therefore to announce a legal judgment after the merits of the arguments have been heard and the truth diligently investigated. It is fitting that judges first fully examine the nature of the case and then frequently question both parties as to whether they wish to add something new, change something, or even

323 Cod. 2.4.20. See also the comments on settlements by Keyser, "Agreement Supercedes," 80.

324 Compare the *Summa Trecensis*, 2.3.2. The phrase was well known in the Anglo-Norman World and appears in various texts concerning Becket. See, most recently, Taliodoros, "Law and Theology."

325 I follow here the sense in the *Codex Theodosianus*, on which see below.

326 Cod. Th. 2.9.3.

327 Cod. 2.4.42. See also Litewski, *Zivilprozeß*, 535 n. 146, comparing Bulgarus, the *Ordo Bambergensis*, cap. xxi, and *Olim edebatur actio* §669.

328 Zimmermann, *Law of Obligations*, 670, but without consideration of the *ordines*. See also William of Cabriano, *Casus Codicis*, 308.10–12, with reference to Dig. 45.1.36.

329 This is not a separate section with a title in Warnkönig's edition. On this subject, Nörr, *Prozessrecht*, 54–57.

330 Nörr, *Zur Stellung*, 11 n. 35. On this section as indicating a deficiency in organization, see above in the introduction to the chapter.

correct errors prior to the sentence. It is an indiscrete judge who delivers a rash judgment. Indeed, judges ought not to declare a doubtful decision but, instead, one considered after weighty deliberation. Neither by the imperial rescript,³³¹ which the litigant has requested and obtained nor by the preliminary decision of the judge can the status of possessor be appealed when the one holding the property is absent.³³² The merits of the case are set forth by the mutual assertion of both parties.³³³ The constitutions declare that when an absent party is convicted under the peremptory edict, which either had not been published or he had not noticed, this sentence is invalid.³³⁴ When the peremptory edict ceases against those who, admonished by the judge, refuse to be present, it is certain that the judge is able to declare the judgment.³³⁵

Those things decreed against parties either not contumaciously absent or sued by unaccustomed summons do not obtain the certainty of a judicial decision.³³⁶ If the judge established one location for trying the case and then elsewhere delivered the sentence against the absent party, it is usefully established that this is not valid.³³⁷ When the judge has given a sentence in a secret place, with his attendant not present, it shall not harm anyone.³³⁸ The general law sanctions that the judge is permitted to convict the plaintiff with the prescription of court not opposed as an exception though the plaintiff is not under his jurisdiction.³³⁹ Let him not refuse to have the judge rule against him whose judgment he accepted during the same trial.³⁴⁰ In private matters, this form is preserved:³⁴¹ a sentence declared by a judge lacking jurisdiction does not bind any of

331 Litewski, *Zivilprozeß*, 555 and n. 106, comparing terms in other *ordines*.

332 On *interlocutio*, a preliminary order or decision by the presiding judge, Berger, *Encyclopedic Dictionary*, 512.

333 Cod. 8.5.2.

334 Dig. 49.8.1.3. See above, chapter 2, in Bulgarus' letter to Haimeric.

335 Cod. 7.43.2. On the necessity of the parties being present and the judge declaring his decision, see Bulgarus and Litewski, *Zivilprozeß*, 461.

336 Cod. 7.43.7, also C 3 q. 9 c. 11, and a portion of a very lengthy comment by Gratian, C 2 q. 6 d.p.c. 41 §3.

337 Cod. 7.43.5.

338 Cod. 7.45.6.

339 Cod. 8.35.13. On the necessity of public judgments even in early-medieval procedure, Siems, "Bestechliche und ungerechte Richter," 519.

340 Cod. 7.45.14.

341 Haenel's edition lacks *privatorum*.

the litigants.³⁴² The judge delegated to this so that he may declare concerning possession does not legally rule if he should pronounce concerning ownership.³⁴³ Let all judges declaring final judgment know that the losing party ought to be condemned to pay the victorious party the costs of the trial.³⁴⁴ If, however, the judges should overlook this, they themselves shall have to pay this penalty from their own means.³⁴⁵

After the trial, the losing party proven to have possessed another's property is not only required to restore it, but also to turn over the profits he himself obtained, as well as those he could have acquired, and he must pay them from the time that he knew that he was a possessor in bad faith, as established by the charge brought in court. This rule must also apply to an heir whose property is held by the same defective title.³⁴⁶ If a judge should sell goods adjudicated by his own authority, he shall be liable both to the charge of theft and robbery with violence.³⁴⁷ No one may be executor in his own affair.³⁴⁸

Let ordinary judges carry out their own sentences and those of the judges they delegated.³⁴⁹ Two out of three judges cannot judge with the third absent;³⁵⁰ if, however, the third is present, but disagrees, the

342 Cod. 7.48.4. On the lack of jurisdiction, Litewski, *Zivilprozeß*, 471 n. 286, comparing also *Ordo Bambergensis*, cap. xvii.

343 Cod. 7.48.3.

344 On court costs, Nörr, *Prozessrecht*, 203–04, noting that paying them was also the penalty for contumacy. See also Litewski, *Zivilprozeß*, 296, 463 and nn. 177, 571 and n. 30, as well as Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.176. For contemporary Pisa, Wickham, *Courts and Conflict*, 114. The *Ordo Bambergensis* does not consider court costs; compare, however, the *Practica legum*, on which see chapter 4 below.

345 Cod. 3.1.13.6.

346 Cod. 7.51.2.

347 Dig. 42.1.6.2. On these charges in the classical law, the latter under *rapina*, Berger, *Encyclopedic Dictionary*, 480, 667. If brought within a year, the penalty of *actio vi bonorum raptorum* was particularly severe: four times the value.

348 On the *executor*, here the one responsible for executing the sentence, Berger, *Encyclopedic Dictionary*, 465, also Litewski, *Zivilprozeß*, 576, also 105, comparing the prohibition that one cannot be judge in his own case, on which see chapter four for the *Practica legum*, cap. 26.

349 Cod. 1.9.8.2. On the *De edendo*, Litewski, *Zivilprozeß*, 540 nn. 13, 14.

350 Litewski, *Zivilprozeß*, 84 n. 92, comparing Buglarus here. On the number of judges-delegate normally hearing a case, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.190–91. In the early twelfth century, two was the typical number; three was extraordinary. With Lucius III, three became the norm. Lucius III was Alexander III's successor to the chair of St. Peter. His brief reign, 1181–1185, was marked by disputes with Frederick Barbarossa,

judgment of the two stands.³⁵¹ Let those who contumaciously refuse to submit to the one declaring judgment be punished with the costs of the trial.³⁵² After judgment, a judge cannot change his sentence. Whether done well or badly, he has performed his duty.³⁵³ It has been most frequently established that decisions rendered concerning some do not harm the rights of others.³⁵⁴

Concerning False Documents³⁵⁵

If judgment were given on the basis of false documents and the deception subsequently revealed, the sentence is rescinded, since the documents concerning that crime provided information that had convicted.³⁵⁶ If one had evaded the judge's conscientiousness by using corrupted witnesses and,³⁵⁷ following their testimony, he gave judgment, let the case be restored fully from the beginning.³⁵⁸ Execution of judgment is accustomed to be suspended and reclaiming of damages paid given if it is said that one evaded the judge's scrupulousness by means of false instruments, as long as it proved false, and the principal cause may be sought anew.³⁵⁹ The sentence is rescinded, provided that falsehood was made in its delay. However, if falsehood were charged, but not proved,

though both he and the emperor agreed in their opposition to the growing number and variety of heretical groups.

351 Dig. 42.1.39.

352 Dig. 42.1.53pr.

353 Dig. 42.1.55.

354 Dig. 42.1.63, also discussed by G.R. Evans, *Law and Theology in the Middle Ages*, (London: Routledge, 2012), 34 n. 7.

355 This is not a rubricated section in Warnkönig's edition.

356 On false documents, generally, Nörr, *Prozessrecht*, 156–57, Litewski, *Zivilprozeß*, 536–37, noting also Bulgarus, the *Ordo Bambergensis*, cap. xxi, and *Olim edebatur actio*, §332; for *restitutio* on this basis as discussed here by the *De edendo*, Litewski, *Zivilprozeß*, 528 n. 55.

357 On *religio*, scruples or conscientiousness in judgment, Berger, *Encyclopedic Dictionary*, 673.

358 Mausen, *Veritatis adiutor*, 771 and n. 87 in connection with *restitutio in integrum*, comparing also Bulgarus and the *Ordo Bambergensis*. (Haenel's edition is clearer at this point than Warnkönig's, but compare Cod. 7.58.2 and Cod. 2.4.42.) On *restitutio in integrum* noted, as we have seen, as early as the Marturi case, Berger, *Encyclopedic Dictionary*, 782 and, in general, for the medieval civil and canon law, Helmholz, *The Spirit*, chapter 4. See also Litewski, *Zivilprozeß*, 488 and n. 42, also 524.

359 See above, Cod. 2.7.1, and Mausen, *Veritatis adiutor*, 772 and n. 90.

the judgment shall remain valid. Those having confessed before the magistrate are considered judged.³⁶⁰ Nevertheless, if anyone has confessed while his adversary was absent, he is not considered judged.³⁶¹ A four-month period is granted to those who have confessed so that they may pay what was adjudged.³⁶²

Concerning Arbiters³⁶³

The decision of an arbiter, to whom parties have submitted their dispute, is not legally binding. Agreement among private persons does not establish a judge, nor does an arbiter's decision possess the authority of a legal judgment.³⁶⁴ Rescripts have often declared that there can be no appeal from the judgment of an arbiter, since a legal charge cannot be obtained from this.³⁶⁵ If the decision were submitted to three arbiters,³⁶⁶ agreement of two suffices, even if the third, also present,³⁶⁷ disagrees. However, if he is absent, the decision does not obtain, since the submission to arbitration was made to several people.³⁶⁸

360 Dig. 42.1.56. See also the *Ordo Bambergensis*, cap. xix. On confession, both before the judge and 'extra-judicially,' Helmholz, *The Canon Law*, 329–30.

361 Dig. 42.2.6.3. That confession must be in the presence of one's opponent is discussed here by Litewski, *Zivilprozeß*, 375 n. 284. On *confessio in iure*, see also Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.94–95.

362 Cod. 7.54.3pr. Compare as well William of Cabriano, *Casus codicis*, 47.94–102. On the *De edendo* here, Litewski, *Zivilprozeß*, 378 n. 322, also 540 n. 26.

363 Again, this is not a separate section in the older edition. On recourse to arbiters, the *compromissio in arbitros*, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1. 59–60, also 188–89 on their interaction with judges-delegate. See also, for England earlier in the century, Keyser, "Agreement Supercedes," 78.

364 Cod. 3.13.3. Comparing this with Bulgarus and the *Ordo Bambergensis*, cap. xvii, Litewski, *Zivilprozeß*, 475, 588. Noting that Gratian did not distinguish between an arbiter and a delegated judge, and the difficulty of distinguishing the two in the early *ius commune*, Legendre, *La Pénétration*, 127–28.

365 Cod. 2.55.1. On the *res iudicata*, Dig 42.1.1.

366 On multiple arbiters here, Litewski, *Zivilprozeß*, 582 n. 89.

367 On the majority deciding, Litewski, *Zivilprozeß*, 587 n. 161; that the arbiters must be present when making a decision, 586 n. 159.

368 Dig. 4.8.17.7. On the choosing of an arbiter *ex compromisso*, Berger, *Encyclopedic Dictionary*, 366. That they must be present for the *sententia*, Litewski, *Zivilprozeß*, 586 n. 159.

On Appointing the Judge

He to whom jurisdiction has been delegated has nothing proper to himself but only performs the jurisdiction of the one who ordered him.³⁶⁹ If there were an appeal, it shall return to the delegating judge.³⁷⁰ The custom of the ancients established that he can delegate jurisdiction who holds it by his own right and not by gift from another.³⁷¹ He is able to appoint the judge to whom permission is given by law or constitution. He to whom jurisdiction has been transferred from a magistrate having jurisdiction is able to appoint a judge, for example the legate of the proconsul.³⁷² One must observe that a judge ought not be appointed

369 Dig. 1.21.1.1. On *iurisdictio mandata*, Berger, *Encyclopedic Dictionary*, 524. An extensive treatment, though not considering the *ordines*, is provided by Legendre, *La pénétration*, 117–30, and, on this passage in the *De edendo*, 123–24 and n. 8. The qualities of the judge-delegate are treated by Nörr, *Prozessrecht*, 15 and n. 41 also with review of secondary literature. With particular attention to the Anglo-Norman world, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.180–84. Noting that late twelfth-century canonists, particularly the early decretalists, commentators on the papal letters, strove to accommodate the church's offices of legate and judge-delegate with civilian terms and concepts, including *iurisdictio mandata*, often giving them their own, distinctive, meaning, Robert Figueira, "Decretalists, Medieval Papal Legation, and the Roman Law of Offices and Jurisdiction," *Res publica litterarum* 9 (1986) 110–35. Finally on the form of the papal rescript that made the delegation, Herde, "Päpstliche Delegationsgerichtsbarkeit," 23–24.

370 Dig. 49.3.1.1. On the various terms of appeal, including *provocare*, the word used by the *De edendo*, see Litewski, *Zivilprozeß*, 490–92, especially n. 10, also 516 on delegation and appeal. For comparison of subdelegation of jurisdiction, for England, Sayers, *Judges Delegate*, 135–40, including Normandy, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.184; for Salzburg, Murauer, *Gerichtsbarkeit*, 43–59. For the early thirteenth century and later, Robert C. Figueira, "Subdelegation by Papal Legates in Thirteenth-Century Canon Law: Powers and Limitations," in *In iure veritas: Studies in Canon Law in Memory of Schafer Williams*, ed. Steven B. Bowman and Blanche E. Cody (Cincinnati: College of Law, 1991), 56–79.

371 Dig. 2.1.5. In general, Brundage, *The Medieval Origins*, 370, Nörr, *Prozessrecht*, 10–12, and Litewski, *Zivilprozeß*, 90 and n. 167. This expression is not found in the other *ordines* in this study.

372 Cod. 3.1.5. See Berger, *Encyclopedic Dictionary*, 524 and Litewski, *Zivilprozeß*, 81 n. 24 for reference to the proconsul here, also 90 for *iurisdictio mandata*, (authoritative jurisdiction, which could be delegated under specific conditions, either by location, time, or both), in other *ordines*, though not the *De edendo*. Unlike some later *ordines*, the *De edendo* does not distinguish between *iurisdictio mandata* and *delegata*. Compare also this passage with William of Cabriano, *Casus Codicis*, 135.

whom the other party requests by name.³⁷³ This is a bad precedent, unless it be specially permitted out of respect to the judge requested.³⁷⁴ General law has decreed that no one can be his own judge. It is indeed very wrong that one judges in his own case.³⁷⁵ No one assumes simultaneously the persons of both plaintiff and judge.³⁷⁶ When he assumes the person of the accuser, judicial power is lost.³⁷⁷ Whoever has jurisdiction should not declare a legal judgment for himself, his wife, his children, or any of his dependents.³⁷⁸ In private matters, the father has the power of judge over the son and the son over the father.³⁷⁹ We order all judges, whether in provinces or cities, that if an absent person who has been cited should subsequently appear, they not reveal to him the condition of the case but, instead, keep all knowledge of the judgments from him unless he first makes restitution for damages his absence inflicted on his opponents. Let the judges know that if they neglect anything they shall be compelled

373 On this rule in the *ordines*, Litewski, *Zivilprozeß*, 98, 100.

374 Dig. 5.1.47. The *Summa Stephani* also considered this text when commenting on C 11 q. 1 c. 4, noting the ability of the defendant law to recuse a suspect judge and request another by name, something contrary to the civil law.

375 Cod. 3.5.1. On other *ordines'* treatment of the question of a *iudex in causa sua* and the possibility of his recusal, Litewski, *Zivilprozeß*, 113, Brundage, *The Medieval Origins*, 385 and n. 44, Nörr, *Prozessrecht*, 14–18, though not treating the *De edendo*, and 16 n. 43, noting that the contemporary Anglo-Norman collection of papal decretals, the *Francofurtana*, had a separate title devoted to the recusal of suspect judges. See also Helmholz, *The Ius Commune in England*, 161 for connection to medieval mortuary law.

376 Compare here the Pseudo-Isidorian text attributed to Pope Fabianus at C 4 q. 1 c. 1. On judicial conflict of interest, Brundage, *The Medieval Origins*, 325.

377 Compare C 2 q. 1 d.p.c. 17. This would concern later readers, all very aware of the accusations and counter-accusations of the Becket conflict. See also *The Correspondance of Thomas Becket, Archbishop of Canterbury*, 2 vols., ed. and tr. Anne Duggan (Oxford: Oxford University Press, 2000), 2.904 and n. 16.

378 Dig. 2.1.10. On the *De edendo*, Litewski, *Zivilprozeß*, 106. For the classical law, Alan Rodger, "The Praetor Hoist with his own Petard. The Palingenesia of Dig. 2.1.10," in *Critical Studies in Ancient Law*, 129–30, treating magistrates' abuse of their position. For twelfth-century examples of such abuse by ecclesiastical judges, Sayers, *Judges Delegate*, 133–34 and n. 7, with various papal letters and an example from Bartholomew of Exeter where a judge was recused because he was the plaintiff's employer. She also notes that when complaints about a judge were made arbitrators were quickly appointed to decide whether the accusation was valid. See also Brundage, *The Medieval Origins*, 325 and n. 129 and Nörr, *Zur Stellung*, 45. These prohibitions are not found in the other *ordines* in our study.

379 Dig. 5.1.77. On the *De edendo* here, noting also *Ordo Bambergensis*, cap. xvii, Litewski, *Zivilprozeß*, 106 and n. 425. On *patria potestas* in the classical law, Nicholas, *An Introduction*, 65–68.

to restore from their own property the damages to the injured parties, which ought to be observed even if the person was not cited but had been absent from a guilty conscience.³⁸⁰ Even though a judge is assigned by the imperial sublimity nevertheless, since it is just to try cases without any suspicion, one who considers a judge suspect should be permitted to recuse him before the trial begins,³⁸¹ so that the trial may be transferred to another judge.³⁸² The ordinary judge will require the parties to choose another judge to whom they should submit their arguments as if he himself were chosen by the imperial majesty.³⁸³ A judge who judges badly makes himself liable to a charge.³⁸⁴

Thus, some judgments are said to be final, others interlocutory.³⁸⁵ The interlocutory judgment is where the judge interrupts the trial and declares something, for example for producing witnesses or tendering the oath.³⁸⁶ A final sentence is one which ends the trial and contains either

-
- 380 Cod. 3.1.15. The text in the *De edendo* is noticeably shorter. On *mala conscientia* as knowledge of another's crime, Berger, *Encyclopedic Dictionary*, 407, noting that in the classical law it was obligatory to inform the authorities. This text from the *Codex* was later considered in depth by Durandus, on which see Brundage, *The Medieval Origins*, 337 n. 173 and, in general, Nörr, *Zur Stellung*, 13.
- 381 This point is shared with many other *ordines*, including *Ordo Bambergensis*, cap. xvii, on which see Litewski, *Zivilprozeß*, 112 n. 510. See also Legendre, *La pénétration*, 136–37, noting the different positions taken by Bulgarus and Martinus.
- 382 On *recusatio* and *exceptio suspicionis*, Nörr, *Prozessrecht*, 16–17 and, for the *De edendo* here, comparing also *Ordo Bambergensis*, cap. xvii and *Practica legum*, cap. 17, Litewski, *Zivilprozeß*, 106–08, also n. 450, that recusal from a delegated judge was also permitted by both the civil law and, by the pontificate of Lucius III, canon law as well. Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.197–202 also discusses this in detail.
- 383 Cod. 3.1.16. See Brundage, *The Medieval Origins*, 385–86 nn. 44, 48 and, for this passage in the *De edendo*, Litewski, *Zivilprozeß*, 82 and n. 65, comparing Bulgarus and *Olim edebatur actio* §218 among several paragraphs.
- 384 On *male iudicat*, Berger, *Encyclopedic Dictionary*, 519, an intentionally wrong decision by the judge. In general, Dig. 50. 13. 0. On this and related issues, Brundage, *The Medieval Origins*, 23–25, 36–38, 191–93, 329–34. In the classical law, judging badly included such procedural issues as adjourning at an inappropriate time, the judge being absent, or holding the trial without a party being present who could have been there. See Metzger, “Absent Parties,” 457–64.
- 385 On judgments final and interlocutory, the latter issued during the course of the trial, Berger, *Encyclopedic Dictionary*, 429 and 512–13. In general, Cod. 7.45.0: *De sententiis et interlocutionibus omnium iudicum*. There does not seem, however, to be a specific text behind the *De edendo* here. See also Nörr, *Prozessrecht*, 193–97.
- 386 Litewski, *Zivilprozeß*, 406 and nn. 776–777, also 479. Compare also the *Ordo Bambergensis*, cap. xxi.

a set penalty or absolution.³⁸⁷ Many judges are accustomed to hesitate in pronouncing a decision and, instead, refer the case to a superior judge if something unexpected should arise.³⁸⁸ If they have done this, then they are said to have made a consultation or a referral, which is a type of appeal.³⁸⁹

Concerning Appeals³⁹⁰

Since many judges deliver bad judgments, it is necessary to appeal from them.³⁹¹ Thus, having finished our treatment of judgments, we shall speak next about appeals. No one should ignore how necessary the use of appeal is, since it corrects the impertinence and iniquity of judges.³⁹² To appeal is nothing other than to prove the judge's iniquitous judgment and to transfer the trial from him to another. One must appeal either at that place by 'living voice' or within ten days in writing, that is through bills of appeal.³⁹³ Bills of appeal must be composed so that they contain who is appealing, against whom, from whom, and by whose judgment.³⁹⁴ The appeal must be made from the judge, not from the one executing the judgment. One must take care not to appeal from the executor, unless by

387 See Litewski, *Zivilprozeß*, 456–57 nn. 80, 86, also 458 n. 109 and 465 n. 206, comparing also Bulgarus and *Olim edebatur actio*, also *Ordo Bambergensis*, cap. xxi.

388 With reference to this text in the development of appeals to the papacy, Landau, "Origins of Civil Procedure," 143 and n. 33. See also Litewski, *Zivilprozeß*, 563.

389 Bulgarus treated this at length, on which see above in chapter two. See also Litewski, *Zivilprozeß*, 508 and n. 254, that this was an incorrect understanding of *consultatio* by both the *De edendo* and Bulgarus; also 561 and n. 193 on the referral.

390 On possible dependence on Placentinus here, see above.

391 Litewski, *Zivilprozeß*, 490–92, noting Bulgarus' treatment of *appellatio/provocatio* in his letter to Haimeric. On examples of unfair and corrupt judges-delegate, though from slightly later, Sayers, *Judges Delegate*, 134. On the recusal of judges-delegate, Brundage, *The Medieval Origins*, 387–89.

392 Appeal would become easy and frequent in medieval canonical procedure, as discussed by Brundage, *Medieval Origins*, 452 and 564 for abuse of appeal also, among many studies, Christopher R. Cheney, *From Becket to Langton. English Church Government 1170–1213* (Manchester: The University of Manchester Press, 1956, rp. 1965), 51–52, 63–64, 70.

393 Compare Dig. 1.5.4, also Cod. 7.62.6.5 and 7.62.6.6. Noting also the *Ordo Bambergensis* on this point, Litewski, *Zivilprozeß*, 509 and n. 268. On the *apostoli*, dismissory letters, Brundage, *Medieval Origins*, 452, also Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.107–08. On oral and written appeals, Litewski, *Zivilprozeß*, 505, also listing analogous terms.

394 Dig. 49.1.1.4.

chance he exceeds the sentence declared by the judge.³⁹⁵ If appealed from the executor, the execution of the judgment having been suspended,³⁹⁶ and the property be moveable, which the executor was supposed to restore, let it be taken from the possessor and placed in the hands of an appropriate third party and restored to him for whom the sacred judge shall judge.³⁹⁷ If (it is) immovable property, for example a piece of land, and an appeal suspends the execution, let the fruits gained from it during the time of appeal subsequently be placed in deposit, with the property itself constituted in the hands of him who appealed.³⁹⁸ It is prohibited by the law of Justinian's *Codex* concerning these same chapters to appeal in the same case for a third time.³⁹⁹ Up to the tenth day, he shall be able to appeal whenever and as often as he wishes, through that text which obtains the sanction of the *Decretum*.⁴⁰⁰ If anyone renounced all appeal prior to the sentence, he has lost the aid of appeal completely.⁴⁰¹ A sentence given must not be assigned to execution for ten days so that during that time the one sentenced may consider whether or not he wishes to appeal. Every sentence then must be assigned to execution when it has been strengthened by ten days of silence.⁴⁰² One has often established that, although an appeal subsequently may have been repudiated by the judge, nothing ought to be done to prejudice the deliberation. Instead, all matters should be in the state they had been at the time of the appeal.⁴⁰³

395 For the executor in this context, Litewski, *Zivilprozeß*, 540 n. 26, comparing also Bulgarus.

396 Litewski, *Zivilprozeß*, 506.

397 On *sacer cognitor*, Berger, *Encyclopedic Dictionary*, 394. Treating the *De edendo* here, Fowler-Magerl, *Ordines*, 156–57. On the sequestration of moveable property, Litewski, *Zivilprozeß*, 508 n. 251.

398 Cod. Th. 11.36.25.

399 See above in the introduction to this chapter for discussion of the *De edendo*'s sources. Compare also Morey and Brooke, *Letters and Charters*, 284, Ep. 212, written by Gilbert Foliot to Pope Alexander III in 1170. Sent prior to Becket's murder, the letter reviews the conflict, litigation, and appeals the bishop had endured and thanks the pope for absolution. On this, generally, Taliodoros, "Law and Theology."

400 See above in the discussion of the *De edendo*'s sources.

401 Compare Dig. 49.2.1.3.

402 Compare Cod. 1.19.3, also William of Cabriano, *Casus Codicis*, 26.

403 Cod. 7.62.3. Compare also a letter (Ep. 93) from Gilbert Foliot to Ralph of Worcester treated by Morey and Brooke, *Letters and Charters*, 130 noting that this letter, containing scattered references to civil law, concerns Ralph's case against the earl of Hereford, who had appealed to the court of Archbishop Theobald of Canterbury, the papal legate. See also, in general, Taliodoros, "Law and Theology."

If anyone, on account of fear, did not appeal,⁴⁰⁴ then let him be heard by a competent judge as if he had appealed. If someone offered bills of appeal to the judge and they did not express the reason well, let him know he has permission to change them, lest he be deprived of the human feeling of just penance.⁴⁰⁵ Likewise, it is fitting that he who appealed be defended in his remaining cases even though the reason for the appeal changes.⁴⁰⁶ Whoever has argued his case for appeal poorly before the judge from whom he is appealing is not prevented from making another before the one to whom it was appealed.⁴⁰⁷

After the appeal has been made, the judge from whom it was appealed must give a report to the appellate judge. We call this report 'dismissive' or *apostolos*.⁴⁰⁸ Its sense is such: 'Lucius Titus, for example, appealed from the sentence of the proconsul delivered in the dispute between himself and Sempronius.'⁴⁰⁹ Allegations from both parties must be inserted in the report. It suffices that the one who appeals ask for this report within thirty days, provided he consistently requests it. However, if the judge does not give the report, the appellant's appeal does not cease.⁴¹⁰ It is fitting that the judge appoint the *apostolos* without delay after the appeal has been made, even when the appellant has not asked for it, and no surety for the appeal ought to be offered.⁴¹¹ A pious remedy has been provided that, although the authority of an imperial rescript might intervene, no one is denied the ability to appeal.⁴¹² If one of the litigants has appealed to a

404 Noting the possible influence of Rogerius here, André Gouron, "Dénonciation de nouvel oeuvre et pratique méridionale," in *Life, Law and Letters: Historical Studies in Honour of Antonio García y García*, ed. Peter Linehan, et al. (Rome: Libreria Ateneo salesiano, 1998), 403, rp. in his *Pionniers du droit occidental au Moyen Âge*, cap. xvii. On the *De edendo* here, see also Litewski, *Zivilprozeß*, 510 and n. 280.

405 On the *libellos appellatorios*, see below. This is an interesting expansion of the text from Cod 7.62.28. Compare also Cod. Th. 11.30.56.

406 Compare Dig. 49.11.1. The *De edendo* modifies this text.

407 The civil law did not regularly permit appeals after the final sentence, on which see Nörr, *Prozessrecht*, 201–202, noting also the exception.

408 The *apostolos* was the notice sent to a superior judge. See Dig. 49.6.1pr, also Dig. 50.16.106. This subject is not treated by the other *ordines* in this study, on which see Litewski, *Zivilprozeß*, 514–15.

409 Dig. 49.6.1.1 The *De edendo* modifies the text.

410 Dig. 49.6.1.2.

411 Cod. 7.62.6.6. See Litewski, *Zivilprozeß*, 513 and n. 324.

412 Cod. 7.62.2.

lesser court, and the other to a superior, the appeal made to the greater tribunal shall prevail.

Addition

If it is an ecclesiastical case, the civil judge has no involvement in it. It is the bishop who decides the final judgment. However, if (it concerns a cleric involved in) a civil case its examination will be by a civil judge if first it was in the presence of the bishop⁴¹³ and, after his (the cleric's) degradation by him, then there will be his punishment.⁴¹⁴ Constitution. N. A cleric is sued before the bishop in a pecuniary case; if the bishop defers from judging between (the litigants), the plaintiff has the license to go before the civil judge, provided that before that judge the cleric not offer a surety or unless the case is a civil one. However, if it be an ecclesiastical case, the civil judge has no legal involvement in it,⁴¹⁵ but let the bishop impose the final judgment. If, however, the crime is civil, examination will be by the civil judge if first the bishop is present; afterwards, with the (cleric's) degradation having been done by the bishop, there will be also be his (the cleric's) punishment. If, however, first the case is heard before the bishop, there will be his examination and, afterwards, deprived of his honor and grade,⁴¹⁶ the civil judge shall impose the punishment on him. However, if the crime were ecclesiastical, examination and punishment will be by (his) bishop.

413 The phrase is 'si prius quidem adeatur episcopus.' On *adesse* as being present in court, Berger, *Encyclopedic Dictionary*, 349.

414 The term is *castigatio*, on which see Berger, *Encyclopedic Dictionary*, 382. It was severe corporal punishment for slaves or disobedient soldiers.

415 The term is *contentio*, on which see Berger, *Encyclopedic Dictionary*, 412.

416 The phrase is 'post spoliationem honoris et gradus.'

William of Longchamp's *Practica Legum et decretorum*

The remaining two chapters in this study consider Anglo-Norman *ordines* produced during the twenty years after the martyrdom of Thomas Becket in 1170.¹ In the years following the archbishop's murder in the cathedral, both crown and papacy yielded their positions, but only slightly. Henry II allowed a papal legate, Hugh of Pierleone, into the kingdom and gave up his demand, dating back to the *Constitutions of Clarendon*, that all criminal clerks be tried in royal court. In turn, Pope Alexander III permitted disputes to be heard by feudal courts when they involved ecclesiastical claims and obligations.² Nevertheless, these concessions never led to lasting concord.³ Henry remained determined to retain as much control as possible over the elections of bishops. As the conflict between King John and Archbishop Stephen Langton would soon reveal, the papacy was equally committed to defending its supervision of, and increasing intervention in, the Anglo-Norman church.

After becoming king in 1189, Richard I quickly abandoned whatever 'benevolence,' to quote Frank Barlow, his father had shown towards the Church. The new king showed little if any regard either for ecclesiastical procedure or clerical sensitivities as he appointed new men bishops.⁴ One was William of Longchamp, the author of the *ordo* treated in this chapter, the *Practica legum et decretorum*.⁵

It is evident that William, from a Norman family loyal to Henry II, enjoyed considerable support from the new king.⁶ He was also heartily disliked in

1 Frank Barlow, *Thomas Becket* (Berkeley and Los Angeles: University of California Press, 1990), 274.

2 Barlow, *Thomas Becket*, 272–73. On the influence of Becket's letters, Anne Duggan, *Thomas Becket: A Textual History of His Letters* (Oxford: Clarendon Press, 1980).

3 Barlow, *Thomas Becket*, 273–74.

4 Frank Barlow, *The Feudal Kingdom of England, 1042–1216*, 3rd ed. (London: Longman, 1972), 355.

5 For an introduction, Gouron, "Le rôle," 201, also below.

6 On William's family and its support of Henry II, Barlow, *The Feudal Kingdom of England*, 355, 359 and, more recently, Everett U. Crosby, *The King's Bishops. The Politics of Patronage in England and Normandy, 1066–1216* (New York: Palgrave Macmillan, 2013), 99–104.

England.⁷ This did not stop his rise to power, as he eventually became simultaneously bishop of Ely, papal legate, and Richard's chancellor.⁸ Effectively regent while the king was away on crusade, William constantly strove to expand his power by placing his own men as sheriffs and constables of castles.⁹ A formidable array of opponents, from members of the royal family, to his ecclesiastical colleagues, also began to close ranks against him.¹⁰ By 1191, his king absent and enemies gathering all around, William's power was in steep decline.¹¹ The archbishops of York and Rouen, other English bishops, and no less than four earls, forced him to flee to France and he was excommunicated as well.¹² Over the next few years, William tried to restore his position, but to no avail. Desperate to retain his bishopric and papal legation, in either late 1196 or early 1197 he departed for Rome, an appeal against Archbishop Hubert Walter in hand. He never reached his destination, and died at Poitiers in early 1197.¹³

William's *Practica legum* reflected the growing interest in the Anglo-Norman world for procedural law. It is probably no coincidence that the *Practica* was composed at about the same time as the common-law treatise attributed to

7 Barlow, *The Feudal Kingdom of England*, 374.

8 See Crosby, *The King's Bishops*, 160, also David Bruce Balfour, *William Longchamp: Upward Mobility and Character Assassination in Twelfth-Century England* (PhD Diss. University of Connecticut, 1996), Karn, *English Episcopal Acta, Ely 109–1197*, lxxxii–lxxxiii, and Z.N. Brooke, *The English Church and the Papacy. From the Conquest to the Reign of John* (Cambridge: Cambridge University Press, 1931, rp. 1989), 221, comparing William to Cardinal Wolsey. For other negative views on William, see Cheney, *From Becket to Langton*, 20 n. 3, 28, and 32 n. 4. It is clear that William was not a model pastor. On opposition of the higher clergy to William, Barlow, *The Feudal Kingdom*, 377–78.

9 Richard R. Heiser, "Castles, Constables, and Politics in the Late Twelfth-Century English Governance," *Albion* 32.1 (2000): 19–36.

10 Evidence of William's unpopularity, as well as a possible hint of his legal knowledge, may be gleaned from Gerald of Wales, *Opera* 11, 348–49, cited by Balfour, *William Longchamp*, 97–98. See also Everett U. Crosby, *Bishop and Chapter in Twelfth-Century England. A Study of the Mensa Episcopalis* (Cambridge: Cambridge University Press, 1994), 39–40 and n. 22, citing the *Dialogue of the Exchequer's* not-so-subtle criticism of William's behavior as a feudal lord.

11 He did, however, serve as one of Richard's representatives in a treaty signed with Phillip II of France in July 1193, on which see Jenny Benham, *Peacemaking in the Middle Ages. Principles and Practice* (Manchester and New York: Manchester University Press, 2011), 126. As Benham notes, William affixed his seal along with those of the two other royal representatives. He did not, however, have the royal seal.

12 He was not alone in this regard. For a list of excommunicated Anglo-Norman bishops, beginning with Odo of Bayeux in the eleventh century, Crosby, *The King's Bishops*, 26.

13 Karn, *English Episcopal Acta*, lxxxviii–lxxxix.

Glanvill.¹⁴ As one scholar has noted, there was a tendency in England towards 'a more rule-based mentality' and, alongside those responsible for the ecclesiastical court, royal justices were growing increasingly aware of civilian and canonical procedure.¹⁵ Readers encountering civilian terms such as *mutuum* (loan) and *crimen falsi* (forging, counterfeiting) in Glanvill,¹⁶ would have found William's treatise a valuable supplement.¹⁷ After all, the complicated

-
- 14 *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, ed. and trans. G.D.G. Hall (Oxford: Clarendon Press, 1965). A succinct discussion is provided by Richard H. Helmholz, "Symposium: Relationships Among Roman Law, Common Law, and Modern Civil Law: Ius commune, Canon Law, and Common Law in England," 66 *Tulane Law Review* (1992): 1751–52. Arguing for Godfrey de Lacy as a likely candidate for the author, Turner, "Who Was the Author of Glanvill?," 119–20. On the common law in this period, among many studies, John Hudson, *The Formation of the English Common Law. Law and Society in England from the Norman Conquest to Magna Carta* (London and New York: Longman, 1996).
- 15 John Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford: Clarendon Press, 1994), 273–74. See also Brand, "The Origins of the English Legal Profession," 34, cautioning against mistaking influential men for professional advocates in the late twelfth century. Brand argues that, whatever tendencies towards a more professional, and learned, knowledge and practice of the common law we may discern in the late twelfth century, it is only deeper in the thirteenth that a professional class of English lawyers appears.
- 16 *The Treatise on the Laws and Customs*, xxxvi–xxxvii, also Ralph V. Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176–1239*, (Cambridge: Cambridge University Press, 1985), 34–35 on lay and clerical lawyers, and 95–96. On the degree to which the early English common law could have been influenced by contemporary Romano-canonical process, and also how Glanvill 'mirrors' to some extent ecclesiastical procedure, Richard H. Helmholz, "The Early History of the Grand Jury and the Canon Law," 50 *University of Chicago Law Review* (1983): 613–27; that nothing in Glanvill's treatment of procedure, however, can be directly attributed to the *ordines*, though his distinctions, for example possessory and proprietary actions, could have been inspired by the civil law, Helmholz, "Ius Commune, Canon Law," 1751–52. Compare also Richardson and Sayles, *Law and Legislation*, 107.
- 17 Granted, the differences were often profound. Compare, for example, the Romano-canonical process of appeal treated by our *ordines* with an example of early common-law appeal from Henry 11's reign discussed by Shirley, *The Secular Jurisdiction*, 97. Various scholars have attempted to ascertain whether, for example, the civilian *actio spoli*, which prompted canonists to reflect on the difference between possession and property, influenced the development of *novel disseisin*. See, for example, Hudson, *Land, Law, and Lordship*, 267–68, arguing for some influence. See also the discussion, though without any consideration of the *ordines*, by William A. Varvaro, *Roman Canonical Influence on English Justice and Procedures: The Actio spoli in Canon Law and the Assize of Novel Disseisin in*

and conflicting claims by crown and church alone would have demanded that litigants, advocates, and judges have some familiarity with both secular and sacred law.¹⁸ Readers could have noticed similarities in how witnesses were used in ecclesiastical and royal courts.¹⁹ William's treatment of both civil and canon law should have made the *Practica* an attractive text to possess. It resembles, to some extent, Glanvill's treatise, a 'book of instructions' intended to guide litigants, advocates, and judges.²⁰ Given the importance of the archdeacon in the English ecclesiastical court, one also would think he would have been a particularly eager reader.²¹ However, this seems not to have been the case.

The *Practica legum* survives in a single, twelfth-century manuscript, Paris, BN 3454 (fol. 53rv, 55v), originally from St. Martial at Limoges. It was edited by F. Caillemer in 1883.²² The treatise may be unfinished.²³ Apart from a later study by Gérard Fransen and Pierre Legendre that published a continuation missed by Caillemer (fol. 55v) and corrections to the edition, it has received comparatively little attention.²⁴ The *Practica legum* has been cited only in passing to illustrate the early study and use of Roman law in England.²⁵

English Law (Rome: Pontificia Universitas Gregoriana, 1987), also Richardson and Sayles, *Law and Legislation*, 80–81.

- 18 Turner, *The English Judiciary*, 70–71. On Maitland's attempt to relate *seisin* to the civilian *actio spoli*, which many scholars have rejected Helmholz, "Ius Commune, Canon Law," 1758–59, also 1759–60 on the importance, nevertheless, of Glanvill's introduction of Roman legal terms into the English law. On the monastic honor court, where secular and ecclesiastical disputes often overlapped, Shirley, *The Secular Jurisdiction*, 16–18.
- 19 Helmholz, "Ius Commune, Canon Law," 1779, also Richardson and Sayles, *Law and Legislation*, 82–83, emphasizing that, while the common law did not 'receive' the civil law the way the Continent did, the 'parallels' between the two laws, because 'like situations will produce like solutions,' made Roman law terms and procedures attractive and useful.
- 20 Turner, "Who Was the Author of Glanvill?," 100.
- 21 On archdeacons and judges-delegate as the probable readers of the early *ordines*, though without reference to any texts considered in this study, Richardson and Sayles, *Law and Legislation*, 78–79, arguing that no *ordo* 'offers a parallel to Glanville.'
- 22 Caillemer, *Le droit civil*, 157–226.
- 23 Fitting, *Zur Geschichte der Rechtswissenschaft im Mittelalter*, 94 and Balfour, *William Longchamp*, 78–80.
- 24 Gérard Fransen and Pierre Legendre, "Rectifications et additions au texte imprimé de la 'Practica legum et decretorum,'" *Revue d'histoire du droit français et étranger* (1966): 115–18. See, in general, Fowler-Magerl, *Ordo iudiciorum*, 113–14.
- 25 For example, Pollock and Maitland, *The History of English Law Before the Time of Edward I*, 121 accessed at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2312 on 21 February 2014, also, Ralph V. Turner, "The Judges of King

While it is generally agreed that William must have written the *Practica* before becoming bishop of Ely in 1189,²⁶ where he had received his legal training remains uncertain. At least one scholar has argued he studied at Bologna.²⁷ Perhaps he even taught, as has been suggested, though there is no decisive evidence.²⁸ Certainly, he was somewhat conversant with Bolognese jurisprudence.²⁹ A reference to commentaries in cap. 40 may indicate some familiarity with early glosses to Gratian.³⁰ Equally, his emphasis on the strict formulation of actions may reflect the thought of Johannes Bassianus.³¹ For example, like Bassianus, William focused on the composition of the *libellus*, the bill of accusation.³²

As the *Practica legum* demonstrates, William was familiar with, and particularly interested in, the proper composition of documents. Like his fellow bishops, this was probably the product of some training in the *ars dictaminis* and experience gained as he rose through the ranks of the ecclesiastical hierarchy no doubt sharpened this skill.³³ His focus on documentation is one of the strengths of the *Practica legum*, and a distinctive feature compared to the other *ordines* treated in this study.

The *Practica legum* may be briefly summarized.³⁴ William begins by praising the law and those who practice it, noting as well that government and society are necessarily divided between laity and clergy. The sword of the emperor

John: Their Background and Training," *Speculum* 51.3 (1976): 456–57 and Landau, "Die Anfänge," 19.

26 Balfour, *William Longchamp*, 74, also Sayers, *Papal Judges Delegate*, 45–46.

27 Balfour, *William Longchamp*, 99.

28 Karn, *English Episcopal Acta, Ely 1109–1197*, lxxxiii.

29 Kuttner and Rathbone, "Anglo-Norman Canonists," 290 and Kuttner, in *Retractiones VIII, Gratian and the Schools of Law*.

30 See Fransen and Legendre, "Rectifications et additions." For a general discussion of how these and other 'research tools' emerged during the twelfth and early thirteenth centuries, Mary A. and Richard H. Rouse, "The Development of Research Tools in the Thirteenth Century," in *Authentic Witnesses: Approaches to Medieval Texts and Manuscripts* (Notre Dame: University of Notre Dame Press, 1991), 221–58.

31 Suggested by William Carey Jones in his notes to William Blackstone, *Commentaries on the Laws of England*, 2 vols. (San Francisco: Bancroft-Whitney Co., 1915–1916), 1.21.

32 Fowler-Magerl, *Ordines iudicarii*, 64.

33 Balfour, *William Longchamp*, 99. For an introduction to the considerable literature on medieval *dictamen*, Martin Camargo, *Ars dictaminis, Ars dictandi*. (Turnhout: Brepols, 1991).

34 As noted by Fransen and Legendre, "Rectifications," the numbered paragraph divisions were largely created by Caillemer. They are retained in the translation for the sake of clarity.

punishes, while the 'diligence of the fisherman' counsels and corrects. Such distinction of secular and sacred government, as well as civil and canon law, appears elsewhere in the treatise.³⁵ William echoes the maxim of *plenitudo potestatis* by emphasizing the unique legal power of the pope. Only he possesses the 'fullness of power,' which enables him to delegate jurisdiction to subordinates.³⁶ At the same time, William notes that the judicial order requires their consultation. Perhaps these 'subordinates' were his intended audience. William then considers the proper composition and presentation of the charge, from the required period during which the defendant decides whether or not to join suit to the assigning of surety.³⁷ William next treats the judge's possible recusal.³⁸ Throughout these sections, he is sensitive to procedural differences between civil and canon law; in the latter, he distinguishes as well the duties of ordinary and delegated judges.

William occasionally highlights differences between older law and contemporary practice.³⁹ Among the authors treated in this study, he seems to have been especially concerned with what one scholar has called the challenge 'to reconcile the Roman legal reason with the feudal society.'⁴⁰ William notes the substitution in canon law of an original papal rescript for the civil-law *editio*.⁴¹ Elsewhere, he calls our attention to a recent decretal of Lucius III declaring a judge suspected in some way, for example due to his blood relation with an advocate, could be recused. While in the classical civil law recusal of a judge only came after the final judgment (as a sort of appeal), canon law now took a different view. William notes how it could take place during the process. Thus recusal became distinct from appeal.⁴²

35 See, for example, cap. 16, noted by Litwesi, *Zivilprozeß*, 61–62 and n. 179.

36 Among many studies of this maxim, which dates back to Pope Leo the Great, Robert L. Benson, "*Plenitudo potestatis*: Evolution of a Formula from Gregory IV to Gratian," *Studia Gratiana* 14 (1967): 196–217.

37 For a summary, Sayers, *Papal Judges Delegate*, 78–79.

38 See Legendre, *La pénétration*, 139 and n. 5.

39 On *hodie* ('today') in twelfth-century civilian jurisprudence, Kantorowicz, *Studies*, 135, also Roumy, "Excerpta Rotomagensia," 928–29.

40 Mayali, "The Development of Law," 1474.

41 For *editio* in classical process, see Beger, *Encyclopedic Dictionary*, 450, on Dig. 2.13 and Cod. 2.1, also the *De edendo* in chapter 3. See also Nörr, *Prozessrecht*, 56–66. On the papal rescript, Helmholz, *The Spirit*, 11. For thirteenth-century papal letters used as the *editio*, Sayers, *Papal Judges Delegate*, 78 n. 3.

42 (JL 14966, x 2.28.36), Lucius III to the Bishop of Lincoln. See Nörr, *Prozessrecht*, 16 and, for the *Practica legum*'s citation of this decretal, also his "Päpstliche Dekretalen in den ordines iudiciorum der frühen Legistik," *Ius Commune* 3 (1970): 5.

It is useful to contrast the *Practica legum* with Hariulf's account of his visit to the curia some three decades earlier. Among the many advances in procedure we find, for example, that William refers to a *specialis nuncius*, a designated representative for a case.⁴³ Like the proctor, such representatives helped litigants avoid, or at least lighten, the many burdens travel to court would bring.⁴⁴ If he had lived in William's time, perhaps the aged abbot would not have had to undertake his journey to Rome.

William largely devoted the remainder of the treatise to exceptions. In this respect, it particularly resembles Glanvill.⁴⁵ While much reflects what we have encountered already in the *De edendo*⁴⁶ and, indeed, William's commentary is far less extensive, there are still points to highlight. For example, William notes the special case where some archbishops are exempted from their primate's jurisdiction.⁴⁷ When referring to the possibility of an exception by reason of location, he observes that when a contract was made at the fairs of Lagny in Champagne, one had to respond to the judge there.⁴⁸ Particularly interesting is his discussion of *quasi maleficcium*⁴⁹ (unintentional injury), for example when one is sued *de pauperie* because his domesticated animal had caused damage.⁵⁰ William's treatment of *quasi maleficcium* as a type of vicarious liability is unique among the *ordines* considered in this study.⁵¹

In treating exceptions, William comments in passing on the ecclesiastical hierarchy. Even if the *Practica legum* was composed prior to his accession to Ely, as seems probable, William was undoubtedly very aware of the conflicting

43 Concerning messengers, in general, Giles Constable, "Dictators and Diplomats in the Eleventh and Twelfth Centuries: Medieval Epistolography and the Birth of Modern Bureaucracy," *Dumbarton Oaks Papers* 46 (1992): 40 noting, for example, that the *nuncius* took the place of a letter. On the public *nuncius*, Nörr, *Prozessrecht*, 69 and nn. 66–67, also, for their role in diplomacy, Benham, *Peacemaking*, 117–18.

44 That this reference in the *Practica legum* may be very early, Brundage, *Medieval Origins*, 464.

45 Turner, "Who Was the Author of Glanvill?," 100.

46 In general, Nörr, *Prozessrecht*, 97–103.

47 On the twelfth-century conflict between York and Canterbury, among many studies, Brooke, *The English Church and the Papacy*, 171–73.

48 Marcel Pouzol, "Les foires de Champagne à Lagny au Moyen Age," *Cercle d'Etudes Archéologiques de Historiques du Pays de Lagny* 7 (1968): 1–18.

49 Inst. 4.5. See Nicholas, *An Introduction*, 224–25.

50 Jolowicz, *Historical Introduction*, 174.

51 Peter Stein, "The *Actio de Effusis vel Dejectis* and the Concept of Quasi-Delict in Scots Law," *The International and Comparative Law Quarterly* 4.3 (1955): 363–65, noting the concept did not exist in the classical Roman Law and was, instead, formulated by the glossators. Stein focusses on Azo and those after him, without reference to William.

claims of archiepiscopal sees such as York and Canterbury.⁵² Given the turbulent nature of the English church in the late twelfth century, a privilege granting an exemption from responding to a summons from one of them would have been prized indeed. The recent conflict between Becket and Henry also would have made William's audience especially sensitive to the *privilegium fori*, which he treats in chapter 20.

We are fortunate to have William's episcopal *acta*. While these cover only 1189–1191,⁵³ they attest to his activities as legate and papal judge-delegate. Unfortunately, they leave no trace in the *Practica Legum*. In this respect, they reflect, as discussed above in chapter three, the general lack of explicit mention of Romanist procedure in *acta* from the period.⁵⁴ An exception is a possible allusion to prescription in letter from 1190–1191, in which Ernisius, prior of Marton informs the bishop about elections at Kirkham Priory. He references an appeal to the papacy 'more than forty years ago' to ensure their rights.⁵⁵ William does not comment further.

While William's *acta* do not shed light on the *Practica Legum*, there is other evidence of the treatise's connection with contemporary legal thought and practice. In a letter of 1163–1164, Bishop Gilbert Foliot of London wrote to Thomas on behalf of a clerk, Hubert, who had raised an exception against another priest, Baldwin, not to pay 20 shillings. Gilbert agreed with Hubert and asked the archbishop for a trial to be set. As part of this request, Gilbert noted that whoever lost the proceedings would not only lose what he had demanded but also be compelled to pay trial costs. Two decades later, we find in chapter 11 of the *Practica Legum* that a tenth part of the suit would be paid by the loser to cover expenses. (We already have seen such concern for payment of expenses in the *De edendo*.) Additional research might uncover other places where the *Practica legum* spoke to contemporary procedural issues.

As noted already, William was aware of the papal *ius novum*. For example, in chapter 16, he states that it was the judge's duty to inquire about the facts of a charge. Both contemporary decretists and papal decretals considered this

52 On contemporary discussions of a metropolitan's jurisdiction, Peter Landau, "Die Rechtsstellung des Metropoliten in der Geschichte des Kirchenrechts," in *1200 Jahre Erzbistum Salzburg. Dom und Geschichte* (Salzburg: Domkapitel zu Salzburg, 1998), 521–42. For a slightly earlier comment by John of Salisbury, Kerner, "Johannes von Salisbury," 512.

53 Karn, *EEA Ely*, cxx–cxxi.

54 Brett, "The Bishop's Charter," 3–16.

55 Karn, *EEA Ely*, (Sup. 5), 243–44.

as well.⁵⁶ Citing selected decretals,⁵⁷ William devotes much attention to the papal rescript.⁵⁸ He treats both the inspection of the document to determine its authenticity and what to do when multiple letters arrived concerning the same case. Litigation attracted by the papal curia, another subject treated at some length in the treatise, and the requirements of royal service demanded a thorough knowledge of legal instruments. While his episcopal colleagues were undoubtedly familiar with their composition and use, William was probably more expert than many.⁵⁹

From time to time, the *Practica legum* treats an aspect of procedure or takes a position not found in the other *ordines* considered in this volume. For example, William's reference to the 'simplicity of the canons' (*canonum simplicitas*) may be unique. Perhaps this was some sort of ironic reference to the civilians' contempt for the canon law.⁶⁰ William demonstrates his knowledge of the classical law by comparing the *praetor* and *magister militum*, the latter, the judge for military cases.⁶¹ More pertinent to his audience, he also treats a twenty-day period for recusal.⁶² Equally, his commentary on rescripts, for example, whether they were granted to someone present or absent, would have been of value to his contemporaries.⁶³ The same holds true for his reflection on how rescripts related to exceptions.⁶⁴ Given the frequent disputes over jurisdiction,⁶⁵ readers also would have found William's comments on its

56 Brundage, *Medieval Origins*, 381–82.

57 Knut Wolfgang Nörr, "Päpstliche Dekretalen in den ordines iudiciorum," 4–5.

58 Noting, however, that these decretals, along with the canons in Gratian, did not lend themselves to the compromises that were so common in dispute resolution, both secular and ecclesiastical, Wickham, *Courts and Conflict*, 237.

59 William refers to letters patent while serving as an envoy for Richard I. See Pierre Chaplais, *English Diplomatic Practice in the Middle Ages* (London and New York: Hambledon, 2003), 70. Such facility with courts secular and Christian would be increasingly necessary, on which see Donahue, "Roman Canon Law," 660–63.

60 See Litewski, *Zivilprozeß* 239 n. 176. Alternatively, twelfth-century theology was formulating the concept of 'divine simplicity,' on which see the *Stanford Encyclopedia of Philosophy*, accessed at <http://plato.stanford.edu/entries/divine-simplicity/> on 18 April 2015.

61 Litewski, *Zivilprozeß*, 81 n. 29. Both the *praetor* and the *magister militum* had *imperium* and, accordingly, could not be summoned to court. In Late Antiquity, the *magister militum* was the emperor's chief military assistant, on which see Berger, *Encyclopedic Dictionary*, 571. On exemption of soldiers in the later Empire, generally, Harries, *Law and Empire*, 125.

62 Litewski, *Zivilprozeß*, 112.

63 Litewski, *Zivilprozeß*, 556.

64 Litewski, *Zivilprozeß*, 307, 312 n. 176, also 304 for the *Practica legum*'s listing of exceptions.

65 While mostly treating later examples, Sayers, *Papal Judges Delegate*, 168–72.

limitations worthy of note.⁶⁶ One wonders as well if this passage also came back to haunt William after his troubles began in the early 1190s. Finally, anticipating to some extent our next chapter, where the *Ordo Bambergensis* will consider presumption in some depth, the *Practica legum* treats suspicion.⁶⁷

William's use of sources also differs somewhat from those exploited by the other *ordines* treated in this study. Unlike Bulgarus and the *De edendo*, he occasionally cited the Bible. Only the *Ordo Bambergensis* will refer to sacred scripture as frequently as the *Practica legum*. Such concern to connect legal procedure to the Old and New Testaments, while obviously not unprecedented, was becoming less common by the late twelfth century.⁶⁸ As these citations come from early on in the treatise, perhaps they reflect a rhetorical strategy, a type of pastoral exhortation to the reader. They do not suggest, however, as one scholar has argued in a study of William's contemporary, Bernard of Pavia, any reading of the sacred text as a type of medieval 'comparative law.'⁶⁹

Compared to the *De edendo*, the *Practica legum* is a concise and accessible work. Most of the arcane aspects of the civil law we found in the *De edendo* and Bulgarus, for example citations of long-vanished imperial offices like the *Spectablis*, are absent. William has his reader in mind throughout his treatise. If we hear echoes of the classroom in the reference to Titius, Maevius, and a dispute over land, there is a practical orientation to the text. The liturgical calendar he references would have been the principal way his ecclesiastical reader marked time. No less relevant would be the illustrations he used for his points of procedure. His readers could have attended, or at least known about, the fairs at Lagny. Ecclesiastics and noblemen bought, and litigated over, horses.

Despite his many enemies, William had his circle of influence. Gerald of Wales numbered among those enjoyed his patronage.⁷⁰ The royal justice and cleric, Richard Barre, dedicated an exegetical work to him.⁷¹ Nevertheless, if the bishop composed the treatise in the hopes of attracting patrons, as has

66 Litewski, *Zivilprozeß*, 89.

67 Litewski, *Zivilprozeß*, 111 n. 494.

68 Richard Helmholz, "The Development of Law in the Classical and Early Medieval Europe: The Bible in the Service of the Canon Law," 70 *Chicago-Kent College of Law Review* (1995): 1562 also noting, however, that it never became irrelevant. He does not discuss the *Practica legum*.

69 Peter Landau, "Alttestamentliches Recht in der 'Compilatio Prima' und sein Einfluss auf das kanonische Recht," in *Mélanges Gérard Fransen* ed. Stephan Kuttner and Alphonse Stickler, 2 vols. (Rome: Libreria Ateneo Salesiano, 1976), 2. 111–33.

70 Cheney, *From Becket to Langton*, 29.

71 Turner, *The English Judiciary*, 96.

been suggested, he failed.⁷² Older scholars argued that it may have been the source for the forms of action in the early common law and, perhaps, even Bracton's understanding of dilatory and peremptory exceptions.⁷³ There seems no convincing evidence for this. Yet, William's failure to reach an audience does not diminish the *Practica legum*'s contribution to ecclesiastical procedure. Product of the 1180s, it demonstrates the increasing combination of Roman and canonistic procedural law in the *ius commune*. For all his faults as both bishop and royal administrator—and these may well have been legion—William of Longchamp thus deserves to be remembered as one of the pioneers of the *ordines*.

Here begin the *Guidelines* of the laws and decretals composed by Master William de Longchamp.⁷⁴

1. The science of the law is truly a most sacred thing.⁷⁵ From it proceed both the simplicity of the dove and the guile of the serpent⁷⁶ so that you may neither defraud your brother in judgment⁷⁷ nor yourself be tripped up by the plots of others. Indeed, St. Jerome bears witness that it is equally probable that one will deceive or be deceived in judgment.⁷⁸
2. Therefore, with high and considered counsel, the Lord desired that certain men be preceptors of this science, lest if some vague faculty

⁷² Balfour, *William Longchamp*, abstract to the dissertation.

⁷³ Charles P. Sherman, "A Brief History of Medieval Roman Canon Law in England," *University of Pennsylvania Law Review and American Law Register* 68.3 (1920): 244, also T.F.T. Plucknett, "The Relations between Roman Law and English Common Law down to the Sixteenth Century: A General Survey," *The University of Toronto Law Journal* 3.1 (1939): 35 and n. 47, with reservations, though Romano-canonical procedure could have set a 'standard' advocates of the common law strove to match. See also Vindogradoff, *Roman Law in Medieval Europe*, 100.

⁷⁴ *Practica* could mean 'practices' or perhaps, 'exercises.' 'Guidelines' seemed also a good choice here. See Niermeyer, *Lexicon minus*, 821, accessed at <https://archive.org/details/NiermeyerLexiconMinus1976> on 21 June 2014. Other possible meanings include the sense of 'notable legal matters,' on which see Ducange, *Glossarium mediae et infimae latinitatis* 6.444c, accessed at <http://ducange.enc.sorbonne.fr/PRACTICA2> on 20 March 2014.

⁷⁵ C 16 q. 1 c. 5 and §1.

⁷⁶ Matt. 10.16. See Brundage, *Medieval Origins*, 428 n. 68 for the later use of this passage by Johannes de Deo.

⁷⁷ 1 Thess. 4.6.

⁷⁸ C 16 q. 1 c. 5.

of making law be granted to someone out of the confusion of the constituents there arise (equal) confusion of matters or, even worse, a self-appointed judge,⁷⁹ who easily ignores fault to the detriment of his subordinates,⁸⁰ and does not equitably render what is due his superior or equal.⁸¹

3. Just as there are two kinds of men, clerical and lay, distinguished by reason of their profession and way of life, thus by a twofold reason the pious Father provided the human race with both the lay and priestly realms,⁸² so that neither the ecclesiastical kingdom usurps the rule of the earthly nor the latter, attempting sacrilege, assails the laws of ecclesiastical governance.
4. If, in fact, by the severity of the sword wielded by the emperor,⁸³ God wished the excesses of laymen to be corrected, then He also desired that the clerical life be moderated by the diligence of the fisherman (the pope). The authority of commanding rests in the hands of these men: for the remainder, the need to obey.⁸⁴
5. But, since they are only men,⁸⁵ they cannot by themselves carry such a burden on their own shoulders and thus they called others into a share of the concern, but not the fullness of power.⁸⁶ To these, indeed, they gave the faculty of discussing the affairs of subordinates, with these matters first having been aired according to the legal order.
6. However, in all legal enforcements one must maintain judicial order and solemnity.
7. If anyone, therefore, should believe another legally obligated to him, let him first go to a competent judge and compose a brief called a *conventionalis*,⁸⁷ in which the name of the judge appears first, then the plaintiff, followed by the defendant. Then let the form

79 Reading *Ne dum* for *nedum*.

80 Compare II Chron. 11.15.

81 The phrase is *equa lance redderetur*.

82 Compare D 96 c. 6.

83 C 21 q. 5 c. 6.

84 In general, Benson, "Plenitudo potestatis."

85 C 26 q. 7 c. 12. On this canon and the law of sanctuary, Helmholz, *The Ius Commune*, 17.

86 Again, an echo of *plenitudo potestatis, pars sollicitudinis*. See above in the introduction to this chapter.

87 Nörr, *Prozessrecht*, 85 also, Litewski, *Zivilprozeß*, 228 and n. 52, and 232. Compare *Ordo Bambergensis*, cap. 1, and Helmholz, "Canon Law, Ius Commune," 1776.

of the suit be designated,⁸⁸ the charge brought,⁸⁹ and, finally, the date of the brief's composition set down.⁹⁰

8. Let a proper name designate the form of the suit, for instance if it is a serf being sued, with designation of form, figure, or weight, as in the case of a goblet, or in a fixed quantity, as money, for example by saying 10 or 100, or measure, as in grain, wine, and similar things, for instance, three measures or two, or whenever⁹¹ by another expression, for when a horse is being claimed, he ought to designate color and size, whether it is big, small, or medium-sized, a destrier, palfrey, or a nag, and by another certain sign, for instance if it has a mark on its head or something else. I speak thus when a particular horse is being claimed; if a horse were promised in general, without any definition,⁹² this is done without any certification. When, however, a fixed parcel of land is being claimed, one must name the boundaries of the field, for example: who has the property on the east side of Mevius' property, on the west, the property of Ticius, on the north, the land of Pamphilius, and on the south, a public road.⁹³
9. §The action must be designated not only generally but specifically.⁹⁴ If it be only in general, let the reason be assigned from which the obligation arose.⁹⁵ Since the fixed quantity is general to all obligation from which someone can sue specifically,⁹⁶ he ought to express another suit, if another applies from that contract, for instance from sale or deposit.⁹⁷ If no other suit applies to that contract, then the reason must be designated from which it arose, for instance the fixed condition from a loan.⁹⁸

88 Litewski, *Zivilprozeß*, 226 and n. 14, comparing *De edendo* and *Ordo Bambergensis*, cap. i.

89 *Et actio edatur*.

90 Noting agreement with civilian practice, Litewski, *Zivilprozeß*, 233 and n. 109.

91 *Quandoque* for *quacumque*.

92 *Indefinite* for *infinite*.

93 We encountered these fictive names in Bulgarus' letter.

94 The editor notes same phrase in the *Ordo Bambergensis*. On the *Practica legum* here, Litewski, *Zivilprozeß*, 211 and n. 318.

95 Instead of *exponatur* in the edition, the manuscript gives *opponatur*, then corrected to *apponatur*. See Litewski, *Zivilprozeß*, 238 and n. 167.

96 Compare the *De edendo* here. On the *condictio certi*, see also *Ordo Bambergensis*, cap. i, noted by Litewski, *Zivilprozeß*, 240 n. 182.

97 Dig. 13.4.7pr.

98 Cod. 7.35.5, also Kaser, *Zivilprozeßrecht*, 485 and n. 7.

10. With this done, and surety provided, let the plaintiff produce surety in the execution of the trial, namely that he shall join issue within two months or restore twofold all damage to the defendant resulting from this suit that does not exceed the sum of 36 *aurea*.⁹⁹ The *aureus*, however, is computed legally for the *solidus*.¹⁰⁰
11. He shall provide also another surety if he should lose his case: namely to restore to the accused a tenth part covered in the bill for expenses. If the defendant should vow that he spent more, the judge shall award in excess of the aforesaid quantity.¹⁰¹
12. With this done, let him present the bill of accusation to the judge.¹⁰² Then, through the executor,¹⁰³ let the bill be offered to the accused, who shall have surety furnished upon demand and, then, according to the amount of the suit, let gifts be given the executor.¹⁰⁴ Let the accused then enjoy a twenty-day grace period to consider whether to yield or contest.¹⁰⁵
13. Thus, any joinder of issue held against this concession is void.¹⁰⁶
14. If, however, the prior solemnities should be in any way defective, the bill of accusation must be completely composed again, with new delays granted in entirety, even if only one day remains from the twenty days of grace.

99 Compare Nov. 96 c. 1. On amounts of surety and damages in the classical law, Kaser, *Zivilprozeßrecht*, 572; for the canon law, C 3 q. 3 c. 2 §4: On this novel in the *Practica legum*, Litewski, *Zivilprozeß*, 250.

100 The late-antique and Byzantine coin that replaced the *aureus*, on which see <https://www2.lawrence.edu/dept/art/BUERGER/ESSAYS/BYZANT.HTML> accessed on 11 November 2015.

101 Nov. 112 c. 2, discussed at length by Kaser, *Zivilprozeßrecht*, 571–73. On contemporary examples of the *cautio* in procedure, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.80–81. On this novel in the *Practica legum*, Litewski, *Zivilprozeß*, 250–51. Compare also *Ordo Bambergensis*, cap. viii and xxii.

102 C 3 q. 3 c. 2 and §1. On the *Practica legum* here, Litewski, *Zivilprozeß*, 248, also n. 294, comparing *Olim edebatur actio* §230 and *Ordo Bambergensis*, cap. i.

103 That this is the most common term, Litewski, *Zivilprozeß*, 259 n. 457, comparing also *De edendo*.

104 Nov. 53 c. 3 §2. These are the *sportulae* discussed previously in this study. In general, Kaser, *Zivilprozeßrecht*, 573–74, Nörr, *Prozessrecht*, 203, also Litewski, *Zivilprozeß*, 570 n. 14, comparing *Ordo Bambergensis*, cap. xiii.

105 Nov. 53 c. 3 §1. Kaser, *Zivilprozeßrecht*, 575, also Brundage, *Medieval Origins*, 386 and n. 50.

106 Litewski, *Zivilprozeß*, 254 and n. 375.

15. During this time of deliberation, let him likewise reflect on whether he wishes to go to trial before that judge or to recuse him, as it were, as suspect or¹⁰⁷ if he desires another to be assigned,¹⁰⁸ unless that judge be the one, with the other recused, he had already requested in another trial.¹⁰⁹
16. Some of these things, though not all, are observed in canon law. Neither the presentation of the bill is observed nor the giving of surety.¹¹⁰ Yet the rest ought to be, namely the designation of action by the aforementioned signs, without setting forth the charge. Indeed, the simplicity of the canons does not desire this,¹¹¹ but it suffices merely to ask for the judge.¹¹² Today, in place of the notification of the defendant,¹¹³ according to custom, which appears consonant with the law,¹¹⁴ among judges-delegate let the original of the rescript be presented to the defendant under the seal of the judges.¹¹⁵ By the ordinary judges, however, let the complaint of the

107 Reading *uel* for *et* in the edition. On this period, see above in the introduction to the chapter.

108 Nov. 53 c. 3 §1. See above.

109 See chapter 5, where the *Ordo Bambergensis*, cap. xvii will treat suspect judges at greater length.

110 Compare a slightly later decretal of Pope Celestine III from 1193 (JL 17052, x 2.8.2). On this, Anne J. Dugan, “*Manu sollicitudinis*: Celestine III and Canon Law,” in *Pope Celestine III (1191–1198). Diplomat and Pastor*, ed. John Doran and Damian J. Smith (Farnham: Ashgate, 2008), 189–236. On this section of the *Practica legum*, Litewski, *Zivilprozeß* 227–28, 239, 246.

111 See above in the introduction to this chapter.

112 Compare a letter of Pope Lucius III (Comp. I 2.20.45, x 2.28.36). See Nörr, *Prozeßrecht*, 16 and n. 43, noting the decretal, its reception in the *Collectio Francofurtana* (M 38.8a), and how it demonstrates understanding of the judge’s recusal as separate from an appeal. For additional discussion, Brundage, *Medieval Origins*, 325 n. 129. Neither author, however, discusses the *Practica legum*.

113 On the *editio actionis*, notification of the accused of the action to be brought, Berger, *Encyclopedic Dictionary*, 450 and chapter 3 above for the *De edendo*. For the *Practica legum*, Litewski, “Mündliche Klage,” 673.

114 For detailed discussion of custom as understood by canonists in the second half of the twelfth century, though without consideration of the *ordines*, Rudolf Weigand, “Die Rechtslehre der Scholastik bei den Dekretisten und Dekretalisten,” in *La Norma en el derecho canonico* (Pamplona: Ediciones Universidad de Navarra, 1979), 106–10.

115 Litewski, *Zivilprozeß*, 259 n. 458, 559 and n. 168, comparing the *De edendo* and *Olim edebatur actio* §218, 220.

plaintiff be declared to the defendant either in his own letter or through a messenger under oath.¹¹⁶

17. The canons do not admit the recusal of the judge but, in its place, an appeal occurs.¹¹⁷ Indeed, since in the canons each party was permitted to appeal, it was not necessary that another remedy be applied. Since, however, according to the civil laws only¹¹⁸ when the sentence is given it is permissible to appeal, it was necessary to find a remedy for recusal.¹¹⁹ Today, with the new law introduced by Pope Lucius III,¹²⁰ if a case has been committed to the judgment of someone either related to the one who obtained the letter or acts as advocate in the same affair, or suspect in any case,¹²¹ he rightly can be recused, even though the case was delegated with no possibility of appeal.¹²²
18. I understand this as so if a just cause of suspicion were alleged and proved, just as if it were appealed by that man in the same case;¹²³ or if he were infamous, the property would return to him; (other instances might be) if he were an enemy, or that something else might happen on account of which the laws and canons prohibit him from duty of judging.¹²⁴ Indeed, it does not suffice, I believe, merely to say that the *appointed* judge is suspect, unless the reason

116 On the *Practica legum* here, Litewski, *Zivilprozeß*, 227, also 560 and n. 184, comparing *Olim edebatur actio* §218. See also above in the introduction to this chapter.

117 Brundage, *Medieval Origins*, 126, also the consideration of documents by the *De edendo* in chapter 3. William here is contrasting older tradition, the canons, with the new decretal law.

118 *Demum* for *domini* which, as Legendre and Fransen note, negates the comments made by Caillemier in his note about the opposition of civil to canon law.

119 In general, comparing the *De edendo* and *Ordo Bambergensis*, xvii, Litewski, *Zivilprozeß*, 107 and n. 433.

120 On this decretal, see above, also Litewski, *Zivilprozeß*, 107, 111.

121 *Huiusmodi* for *hic*. On suspicion here, Litewski, *Zivilprozeß*, 110 and n. 472–473, comparing also *Ordo Bambergensis*, cap. xvii.

122 On the possibility of recusing the delegated judge, considering this decretal and comparing the *De edendo* and *Ordo Bambergensis*, cap. xvii, Litewski, *Zivilprozeß*, 108 n. 450, and 109 n. 467 on the formula *appellatione remota*. As we have noted earlier in this study, appeals were often a delaying tactic. See also Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.226–28.

123 See the introduction to this chapter.

124 Litewski, *Zivilprozeß*, 110–11 and n. 479–481, comparing a similar section in *Ordo Bambergensis*, cap. xvii. He also notes that emnity was the most common reason discussed by the *ordines*.

for suspicion is argued and proven. Otherwise, a letter obtained from the pope could be forged.¹²⁵

19. Therefore, before that judge whom he recuses he ought to plead and prove the reason for suspicion just as in other¹²⁶ exceptions of the court¹²⁷ and it will be up to that judge to rule whether it is his jurisdiction or not.¹²⁸
20. One called by the external judge ought either to come in order to respond or to plead the privilege of court which, perhaps, could be understood not so broadly.¹²⁹
21. He ought to come to respond or plead, if summoned to judgment by a judge who has some jurisdiction over him,¹³⁰ unless exempted by some privilege,¹³¹ for example when he is the praetor in the city who hears cases in private law, or the *magister militum* who examines military cases.¹³² If, therefore, a soldier is called by the praetor,¹³³ he ought to come and plead his privilege since only by military privilege

125 William treats whether a single declaration of recusal or an argument sufficed. The editor notes a slightly later decretal of Celestine III (x 2. 20.41 §1t). Forged decretals greatly concerned bishops like William, on which see Charles Duggan, "Improba pestis falsitatis: Forgeries and the Problem of Forgery in Twelfth-Century Decretal Letters (with special reference to English cases)," in *Fälschungen im Mittelalter. Gefälschte Rechtstexte der bestrafte Fälscher*, 6 vols., ed. H. Fuhrmann, et al. (Hannover: Hahnsche Buchhandlung, 1988), 2. 319–61, rp. in his *Decretals and the Creation of New Law*, cap. viii. See also Müller, *Päpstliche Delegationsgerichtsbarkeit*, 1.243–49.

126 Lacuna in edition.

127 On the recusal as an exception here, Litewski, *Zivilprozeß*, 108 and n. 446, and 112 n. 505 on the necessity of proof.

128 Brundage, *Medieval Origins*, 384–91. Compare also a decretal of Celestine III which ruled against this, and declared that recusal should be judged by arbitrators: x 2.28.41 §1.

129 Legendre and Fransen note that there was no reason to correct *infruite* to *infinite* as suggested in the edition. The term can mean "senselessly" or "profusely" as well. Given the debates over prescription of court beginning with the Becket conflict, I believe William may be arguing for a less broad understanding. At the same time, he may very well be stating that others have not bothered to examine the term closely and, thus, have argued "senselessly." On the *praescriptio fori* in Bulgaria, see chapter 2, also above in the introduction to this chapter.

130 Comparing this section with Bulgaria, *De edendo*, and *Ordo Bambergensis*, cap. iii, iv, v, also with selected portions of *Olim edebatur actio*, for example §227, Litewski, *Zivilprozeß*, 80–81.

131 Given William's eventual problems, one wonders if he thought a similar privilege applied to himself as well.

132 See the introduction to this chapter.

133 This reference to the praetor is shared with Bulgaria, as noted by Litewski, *Zivilprozeß*, 80 n. 23.

is he exempted from the praetor's jurisdiction which, if removed, he then would be judged just like the rest. If a cleric be called by the archbishop, since in another case he could be prosecuted by his suffragan bishop,¹³⁴ he ought to come and plead that he ought to be prosecuted under his own bishop until it may be appealed from him or when the case was committed to another by the Lord Pope;¹³⁵ or, called by the ordinary judge, he ought to come and argue that the case was committed to another by the Lord Pope, who has the privilege of examining all cases up to the declaring of appeal and delegation.

22. If, however, a man is summoned by one who either has no jurisdiction or, if he does, nevertheless does not have it over him in particular,¹³⁶ or¹³⁷ it is not removed by privilege, and cannot have it in another case, for instance through appeal, then he is not compelled to come unless summoned by a judge delegated by one who does have jurisdiction over him or could have it in the aforementioned way.
23. When thus he comes to judgment, let the defendant take care not to delay dilatory exceptions until after the joinder of issue.¹³⁸
24. Some exceptions are perpetual, others are dilatory.¹³⁹
25. Dilatory exceptions are those that delay with respect to time, not those that void the process. Dilatory exceptions ought to be raised on behalf of the defendant at the start of the joinder of issue.¹⁴⁰ For, after this, they would be offered in vain. These are appropriate whenever they concern the person of the judge, the plaintiff, from one who wishes to go to court on behalf of another,¹⁴¹ from the accused, concerning time, place, or from the case being brought or by reason of rescript.¹⁴²

¹³⁴ Litewski, *Zivilprozeß*, 80 n. 12, 13, comparing *Ordo Bambergensis*, cap. iii, which treats metropolitans as judges.

¹³⁵ Litewski, *Zivilprozeß*, 98 and n. 294, comparing also the *De edendo*.

¹³⁶ See the introduction to this chapter.

¹³⁷ *Vel* for *et*.

¹³⁸ Compare C 3 q. 3 d.p.c. 4 §7.

¹³⁹ Compare here the *De edendo*, *Olim edebatur actio* §439–445, and *Ordo Bambergensis*, cap. xii.

¹⁴⁰ On the *Practica legum* here and the *De edendo*, *Olim edebatur actio*, §445, among various paragraphs, and *Ordo Bambergensis*, cap. xii, Litewski, *Zivilprozeß*, 307 n. 123, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1. 86–87.

¹⁴¹ In other words, the proctor.

¹⁴² See the introduction to this chapter.

26. Exception by reason of the plaintiff is appropriate,¹⁴³ when, for example, a minor wishes to sue without the authority of a tutor or a curator,¹⁴⁴ or if he is insane, mentally deficient, a spendthrift (to whom by law the administration of goods is denied), or has made a contract never to make a future claim,¹⁴⁵ or brought suit against the defendant under another judge concerning the same action and it is not yet decided, since one cannot be sued before different judges or, finally, if the plaintiff himself wishes to be judge.¹⁴⁶
27. There is also an exception concerning the person suing on behalf of another,¹⁴⁷ as a proctor for a soldier,¹⁴⁸ or one in religious life for a private person or for a monastery other than his own,¹⁴⁹ or that the proctor is infamous,¹⁵⁰ or does not provide sufficient surety,¹⁵¹ does not have the mandate, is a serf,¹⁵² or a woman,¹⁵³ where one may not sue in his own cause.¹⁵⁴

143 Litewski, *Zivilprozeß*, 310, 477.

144 On the *tutor* and *curator*, Nörr, *Prozessrecht*, 32–33.

145 On the *exceptio pacti de non petendo*, Litewski, *Zivilprozeß*, 303–04 and n. 81, comparing also the *De edendo*.

146 On this prohibition, Litewski, *Zivilprozeß*, 105 and n. 408, comparing again the *De edendo*.

147 Litewski, *Zivilprozeß*, 165 n. 148, and 310 n. 162. The other *ordines* considered in this study do not treat this exception.

148 Dig. 3.3§2. On the *Practica legum* here, comparing also *De edendo*, *Ordo Bambergensis*, cap. vi and *Olim edebatur actio* §512, Litewski, *Zivilprozeß*, 156, also 165 n. 135, on the exclusion of the soldier.

149 Compare C 16 q. 1 c. 12 and §1 and 2, also c. 35. In general, Kaser, *Zivilprozeßrecht*, 580 n. 18 and Helmholz, *The Ius Commune*, 210.

150 *Pauli Sententiae*, I, 2 §1, accessed at http://www.intratext.com/IXT/LATo621/_P4.HTM on 31 July 2014. See also Litewski, *Zivilprozeß*, 165 n. 140. Again, only the *Practica legum* considers this.

151 On this *cautio*, Litewski, *Zivilprozeß*, 168–69 and n. 205, comparing the *De edendo*.

152 Litewski, *Zivilprozeß*, 164 n. 127. On the legal status of slaves/serfs in twelfth-century canon law, though not considering the *ordines*, John Gilchrist, “The Medieval Canon Law on Unfree Persons: Gratian and Decretist Doctrines c. 1141–1234,” in *Mélanges Gerard Fransen*, 1.271–302.

153 Dig. 3.3.54pr. On excluding women, Litewski, *Zivilprozeß*, 164 n. 128. On these exceptions, Kaser, *Zivilprozeßrecht*, 194 n. 24 and 67, that no one unwilling could be forced to sue or accuse.

154 Dig. 3.3.41. In general, Kaser, *Zivilprozeßrecht*, 206–07, also Brundage, *Medieval Origins*, 26 n. 80.

28. Exceptions concerning the person of the defendant include when the question of juvenile status is moved.¹⁵⁵ The trial ought to be delayed until the age of puberty. Again, there is an exception if the defendant appeals or is not under the jurisdiction of the judge before whom he is being sued; other examples are when he is of servile condition and thus cannot be accused, or is exempted by special privilege as certain archbishops are from the jurisdiction of their primate.¹⁵⁶
29. Again, concerning the person of the defendant, he is excepted when absent on public business, since perhaps he is performing a legation; for, after his departure, he cannot be sued concerning earlier contracts.¹⁵⁷ However, he still is able to be sued concerning those he contracted while a legate.¹⁵⁸
30. Yet, one must note that if anyone by reason of a special or general privilege is able to claim an exception against the court, and then still sues before another judge not his ordinary but, instead, delegated,¹⁵⁹ the accused, if he does not wish, shall not receive his claims, unless the plaintiff also responds to the petition.¹⁶⁰ This happens if the defendant demanded this at the beginning of the joinder of issue. For, afterwards, it ought not to be heard,¹⁶¹ unless the prior judgment has been given which, truly, was introduced with great equity. Indeed, it has happened when someone had sued before a judge that the defendant was also suing the one who had accused him before another judge about some case and was obtaining a date to be set which had already been fixed in the other case. Thus, it happened that the execution of one suit impeded the other. Therefore it was secured by a more beneficial counsel that if the accused were contesting this from the start, he could offer reciprocal actions against the plaintiff before the same judge, especially

155 René Metz, "L'enfant dans le droit canonique medieval," *Recueils de la Société Jean Bodin* 36 (1979): 66.

156 See the introduction to this chapter.

157 Dig. 5.1.2§3. See Kaser, *Zivilprozeßrecht*, 244 n. 11, 245 n. 26, and 287 n. 9.

158 Dig. 5.1.2§4.

159 Litewski, *Zivilprozeß*, 93, comparing *Olim edebatur actio* §218, 229 and *Ordo Bambergensis*, cap. xviii.

160 Litewski, *Zivilprozeß*, 318.

161 The *litis contestatio* marks the limit, on which see Litewski, *Zivilprozeß*, 319 and n. 283.

when he could not recuse that judge whose judgment follows in the procedure.¹⁶²

31. An exception by reason of time,¹⁶³ for example, two months, is obtained for the sake of the harvest or gathering the vintage. It is also obtained on account of religious services,¹⁶⁴ extraordinary holy days,¹⁶⁵ or because of Lent.¹⁶⁶ In these seasons, it is not permitted to try cases or make oaths unless to restore peace or because an action would end during this time, namely since *usucapio*¹⁶⁷ or prescription would have to be completed within this period.
32. Exception by reason of place is obtained when, for example, the location appointed is such that one cannot appear there without great distress, for instance because he has enemies along the way. You should understand this accordingly, that he either has enemies in the same place or also has to cross through land held by them. However, if he could come safely, with only a slight detour, he does not have this excuse. Otherwise, if he could come only through a great detour, he shall have the exception by reason of location. It must not be granted him, however, who should not have to detour across vast tracts of land.
33. Exception by reason of the object of the trial ought to be claimed before that judge in whose territory it is located¹⁶⁸ when the suit concerns sale of property, whether real or moveable.¹⁶⁹ It is otherwise in personal actions. However, even before that judge under whom the property he is claiming is placed he is able to sue, since the judge can punish him by reason of that property, whether real

¹⁶² Nov. 96 c. 2. On this novel, Kaser, *Zivilprozeßrecht*, 586 n. 33, also Brundage, *Medieval Origins*, 386 n. 50. For the *Practica legum* here, Litewski, *Zivilprozeß*, 109 and n. 453, 319 and n. 282.

¹⁶³ Litewski, *Zivilprozeß*, 311 and n. 163, comparing *Olim edebatur actio* §318.

¹⁶⁴ *Sollemnitates* for *sollemnitate*.

¹⁶⁵ Dig. 2.12 and Cod. 3.12. On such stays, Kaser, *Zivilprozeßrecht*, 555.

¹⁶⁶ Compare chapter five below for treatment of feasts in the *Ordo Bambergensis*. On the canon law concerning festivals, Christopher R. Cheney. "Rules for the Observance of Feast-Days in Medieval England," *Bulletin of the Institute of Historical Research* 34 (1961): 117–47, rp. in his *The English Church and its Laws* (London: Variorum, 1982), chapter x.

¹⁶⁷ On *usucapio*, gaining ownership through possession, Berger, *Encyclopedic Dictionary*, 752.

¹⁶⁸ Berger, *Encyclopedic Dictionary*, 662 and, on this exception in the *Practica legum*, Litewski, *Zivilprozeß* 312 and n. 177, noting that this meant the court was not responsible for the suit.

¹⁶⁹ *Sive . . . sive* for *si non . . . si non* which, as Fransen and Legendre note, eliminates a lengthy note from Caillemer.

- or moveable.¹⁷⁰ It is otherwise in personal actions, since there the plaintiff follows the court of the defendant.¹⁷¹
34. It is understood that it is another's court by reason of contract,¹⁷² or by reason of admitted or unintentional offense.¹⁷³
 35. If you made a contract at the fairs of Lagny, you shall be compelled to respond before the judge of that place.¹⁷⁴
 36. If you killed another's servant, you shall be sued there by the action of the *Lex Aquila*,¹⁷⁵ which namely arises from the offense. If your beast should cause any damage there, you shall be sued under the action *de pauperie*¹⁷⁶ which arises from supposed offense.
 37. Although anyone can be sued there, I do not deny that, after returning home, he could be sued before his own judge. This was instituted in favor of the plaintiffs, not the defendants. Thus it ought not to be reversed to the injury of the plaintiffs which, indeed, would happen if they could not be sued before their own judges.
 38. By reason of a commission previously made to other judges, a second judge can void the judgment by the delegated judge. For example, if anyone had obtained a papal letter against another about some case,¹⁷⁷ and he subsequently obtained another letter directed to other judges about the same business,¹⁷⁸ the first man is not compelled to respond to the second letter, unless it expressly mentioned the previous letter.¹⁷⁹
 39. However, what if this is contained in the second letter: 'with the letter not objecting, if those things obtained in it appeared with tacit truth' or thus: 'with no letter objecting to truth and justice, if what appeared (was) obtained from the apostolic see?' In both cases, one

170 The same confusion in the edition. See note above.

171 Compare the *De edendo* on this point.

172 Dig. 5.1.19.1. See Kaser, *Zivilprozeßrecht*, 246–47.

173 *Maleficium* and *quasi maleficium*. On the later, Berger, *Roman Law*, 665 and above in the introduction to this chapter.

174 See the introduction to this chapter.

175 Dig. 9.2.2pr. On such injuries and their penalties, Kaser, *Zivilprozeßrecht*, 133.

176 Dig. 9.1.1pr.

177 Litewski, *Zivilprozeß*, 555.

178 Litewski, *Zivilprozeß*, 558 and n. 156.

179 Alexander III, to the Bishop of Winchester, (JL 14156, WH 761, x 1.3.3.), received, for example, by the *Collectio Francofurtana* 43.2. It is discussed by Wolfgang P. Müller, *Huguccio. The Life, Works, and Thought of a Twelfth-Century Jurist* (Washington: Catholic University of America Press, 1994), 180 n. 7. On the *litterae commissionis*, Nörr, *Prozessrecht*, 68.

can say that by no means will it be annulled by the first letter unless proved that it suppressed the truth.¹⁸⁰

40. But if it simply reads ‘with no letter objecting,’ certain ones say that it is voided by the first letter,¹⁸¹ especially by that law which states: ‘Ticius is my heir, all the rest are disinherited; all those by name¹⁸² are to be understood as disinherited,’¹⁸³ and by many other examples easy to find by going through the concordances.¹⁸⁴
41. First, therefore, when anyone is sued by the authority of a rescript,¹⁸⁵ he should carefully consider the seal to see whether its letters and images agree and if its borders are equal.¹⁸⁶ Then he should consider the style of the letter and whether it follows the Roman form. Then he should consider, if it is a letter patent, whether there is any erasure, since this is not prejudicial in a letter close.¹⁸⁷ If in the letter patent there is an erasure,¹⁸⁸ one must consider whether it occurs in a suspicious place or not, since in the former this is prejudicial and creates the suspicion of falsehood. Again, one must consider whether the rescript was granted to someone present or absent.¹⁸⁹ Indeed, the form is different. To those absent it is thus granted: ‘from the complaint of that one it has come to us’ or thus: ‘it was related to us that that one, etc.’ and it can be evaluated from the tenor of the rescript (that he is permitted to use) . . .

180 On comparing letters, Nörr, *Prozessrecht*, 158.

181 Compare also the *quidam* and *alii* found in the *Ordo Bambergensis*. See chapter 5.

182 *Nominatim* for *nominati*. See Gaius, 11.128.

183 Dig. 28.2.25pr.

184 See the introduction to this chapter.

185 Distinguishing between the papal rescript and a decretal, Cheney, *From Becket to Langton*, 45 and n. 1, noting also that *rescriptum* and *decretum* could become interchangeable. See also Litewski, *Zivilprozeß*, 555.

186 Litewski, *Zivilprozeß*, 560, also Müller, *Päpstliche Delegationsgerichtsbarkeit*, 1.220–21.

187 On the civil law, without reference to the *ordines* or contemporary commentaries, V. Platner, “Ueber offene und verschlossene Briefe (Fortsetzung),” *Archiv für die civilistische Praxis* 50.2 (1867): 212–52, also Lévy, *La Hiérarchie*, 75.

188 Compare a letter of Alexander III (JL 14142, x 2.22.3) transmitted in various collections, among them the *Collectio Francofurtana*, 32.2. On this and the penalty for using false documents, Brundage, *Medieval Origins*, 439 n. 103, also Nörr, “Zum institutionellen Rahmen,” 240, and his *Prozessrecht*, 155–56.

189 See above in the introduction to this chapter.

Addition¹⁹⁰

... and is permitted to use; from the tenor of the rescript one is able to judge that the one to whom the rescript was granted did not request in person. However, to those present it is given in this form: 'Coming to Us, the bearer of these showed Us by his complaint,'¹⁹¹ etc. Therefore, if a rescript of this kind be permitted to anyone absent for these reasons, it is able to be challenged, namely through the customary form of the Roman Church of issuing a rescript.¹⁹² Written and signed testimonies favor this.¹⁹³ It happens many times that someone cannot sue another's case at the Roman curia since he is not its particular messenger,¹⁹⁴ nor is he provided with letters from the one whose case he is advancing, letters which customarily are the protection of legates. Therefore, people pretend that the business is theirs and thus it is granted them through the deception of lying, as it were, to the judge.¹⁹⁵ However, that rescript extorted through lying, which ought not be valid, is able to be tested through signed agreements. However, this is able to be observed by another reason because he seems not to have been present, though he petitioned him through a proctor that he would appear with signed originals.¹⁹⁶ Nevertheless, the actual reason for this does not matter,¹⁹⁷ nor must it be investigated through whom the letters were obtained. These examples suffice to support this assertion.

If anyone, therefore, wishes to argue carefully in his own defense, let him not propose all his arguments at once but, instead, produce one, two, or several at a time and then strive to recommend these to the judge. However, should it be declared against him, then let him turn to other remedies. However, it must be known that if anyone already provided with greater ecclesiastical dignities should obtain a (papal) letter concerning a lesser benefice, and the name of the greater benefice has been suppressed, the letter has no force. The same is true if the son of a priest

190 Fransen and Legendre, "Rectifications et additions," 115–18.

191 Compare, for example, *Collectio Francofurtana* 1.11β.

192 Compare D 97 c. 2. William emphasizes the necessity of careful examination. See Litewski, *Zivilprozeß*, 556.

193 On such concordances, the *tabulae signatae*, Berger, *Encyclopedic Dictionary*, 729. In the classical law, seven witnesses were required.

194 See above in the introduction to this chapter.

195 Literally "to the one present."

196 The original document, on which see Berger, *Encyclopedic Dictionary*, 452.

197 Literally "the absolute truth of the subject."

obtained a letter concerning his father's church.¹⁹⁸ In both cases, I understand this to be so if he wished anew to obtain churches of this sort or benefices or even if the letter extended the judgment of ownership. However, it would be otherwise in the recovery of possession,¹⁹⁹ lest it appear to disagree with the signed originals.

Since some exceptions are called peremptory, and others perpetual,²⁰⁰ the latter able to be appointed prior to the joinder of issue, let us see about them. Those are called peremptory since they end the case and do not merely delay; others are perpetual since they are able to be applied by both parties up to the sentence,²⁰¹ not because they always continue, just as a perpetual suit²⁰² does not last forever, but extends up to forty years.²⁰³ However, these happen sometimes when the plaintiff lives a long time,²⁰⁴ or his heir is silent. Sometimes they also come from a pact or a judicial decision, the crime of the plaintiff, or his heir.

-
- 198 Compare a decretal of Alexander III (JL 13982, WH 412, X 1.17.2) to the bishop-elect of Lincoln. On this decretal, found in various decretal collections, among them the *Collectio Francofurtana* M 9.7 and 1.26, three essays by Peter Landau, "Rechtsfortbildung," 72, "Das Weihindernis," 473, and, most recently, "*Collectio Fontanensis*. A Decretal Collection of the Twelfth Century for an English Cistercian Abbey," in *Law as Profession and Practice in Medieval Europe. Essays in Honor of James A. Brundage*, ed. Kenneth Pennington and Melodie Harris Eichbauer (Farnham: Ashgate, 2011), 198 n. 74, discussing how it was part of a block of papal letters in the collection treating priests' sons.
- 199 On the *interdictum recuperandae possessionis*, part of *interdictum de vi*, Berger, *Encyclopedic Dictionary*, 510.
- 200 Compare the *De edendo* and the *Ordo Bambergensis*, cap. v.
- 201 Litewski, *Zivilprozeß*, 306 n. 99 and 308 n. 134, comparing *De edendo*, *Olim edebatur actio* §443, and *Ordo Bambergensis*, cap. xii.
- 202 On *actio perpetua*, Buckland, *Roman Law*, 690.
- 203 This is the more common duration, though some *ordines* give thirty. See Litewski, *Zivilprozeß*, 204 n. 237.
- 204 The phrase is *ex diuturno actoris*.

The *Ordo Bambergensis*

We come now to the final treatise in this study. Surviving in three manuscripts, the anonymous *Ordo Bambergensis* was edited by von Schulte in 1872.¹ The title misleads, for it labels the manuscript's current location, not its place of composition, which was probably somewhere in the Anglo-Norman realm. Some scholars have argued for Oxford,² no doubt influenced by Vacarius' fame. More recently, others have called attention to a possible connection with Ireland, though how close one cannot say for certain. In a formula at the end of the *Ordo* there is a reference to Archbishop John Comyn of Dublin (1182–1212).³ This may suggest it was composed for an ordinary judge, not a judge-delegate.⁴ A precise date cannot be fixed, though a citation of a decretal from Pope Lucius III (JL 15196) and connections to the Anglo-Norman *Summa Lipsiensis* place it sometime after 1186.⁵ It is thus most likely a bit later than the *Practica legum*.

1 *Der Ordo iudiciarius des Codex Bambergensis P 1 n*, ed. Johann Friedrich von Schulte (Vienna: Adolf Holzhausen, 1872), 289–325. The manuscript used was Bamberg, Staatsbibliothek, Canon 17, fol. 55r–63v. In general, Fowler-Magerl, *Ordo*, 105. The work is sometimes cited by its incipit, 'Quia iudiciorum quaedam,' for example by Fowler-Magerl and Litewski. I have chosen to refer to it as the *Ordo Bambergensis*. In addition to the Bamberg manuscript, the *Ordo* is preserved in Cambridge, Trinity College B 1.29, fol. 198v–205v and London, BL Royal 2 D 1X, 2r–10r.

2 For example, Cohen, *History of the Bar*, 96–97.

3 By the late twelfth century, mastery of *formulae*, form letters treating stages in legal process, was essential for ecclesiastical legal officials. On one such formulary, the *A.B.C. Iudices* designed for use by the judge-delegate, also with reference to the *Practica legum*, as well as the *De edendo*, Duggan, "Papal Judges Delegate," 196–99.

4 Fowler-Magerl, *Ordines*, 83.

5 Fowler-Magerl, *Ordo*, 105, also Landau, "Die Anfänge," 18–19, noting its combination of civil and canon law and connection to the *Summa Lipsiensis*, recently edited as *Summa 'Omnis qui iuste iudicat' sive Lipsiensis*, ed. Rudolf Weigand, et al. (Vatican City: Biblioteca Apostolica Vaticana, 2007). On this *summa*, composed in Paris, despite the location of the manuscript (Leipzig, UB 986), Rudolf Weigand, "The Transmontane Decretists," in *The History of Medieval Canon Law*, 195–96. On the author's possible connection to Archbishop John Comyn of Dublin and composition at an Irish legal school, André Gouron, "Un traité juridique d'origine irlandaise: le 'Livre de Florence,'" *Initium* 9 (2004): 61–71, reprinted in his *Pionniers du droit occidentale au Moyen Âge*. This remains, however, supposition. For additional bibliography, <http://faculty.cua.edu/pennington/1140a-z.htm> accessed on 14 April 2014.

The *Ordo Bambergensis* resembles to some extent the *De edendo*. As noted by Fowler-Magerl, both are similarly organized in titles, something lacking in the *Practica legum*. There is further congruence, if not direct dependence, for example in their treatment of absences from trial.⁶ It also periodically agrees with both *Olim edebatur actio* and Bassianus' procedural work, both texts discussed in chapter 3. A good example of agreement with Bassianus may be found in chapter 20, where the *Ordo Bambergensis* treats 'free administration' in the swearing of oaths.

Despite these similarities, the *Ordo Bambergensis* differs sometimes markedly from the treatises considered in previous chapters. It ranges widely across both civil and canon law, so much so that some scholars have called it a 'synthesis.'⁷ There are various instances when the author compares the two laws, for example, on exemptions concerning the summons to court. He pays attention to where the canons differ from the secular laws, for example when the former were either silent or more lenient. The distinctive sphere of canonical procedure is also highlighted by a treatment, if brief, of excommunication in chapter xxi.⁸ While excommunication and other spiritual penalties may not have always had the desired effect, for not every man repented,⁹ it is undeniable that they were a fundamental aspect of ecclesiastical procedure in the late twelfth century. By treating excommunication, this *ordo* thus addresses a procedural concern not found in the other *ordines* we have considered.

The *Ordo* cites both *Digest* and *Codex*, and in roughly equal numbers. The *Authenticum* appears as well from time to time. Like the previous *ordines* in this study, there is little connection with the *Institutes*. Among the early glossators, Placentinus' *Summa* on the *Codex* was clearly a source, something apparent even in the first sentence. His *Quaestiones de iuris subtilitatibus* may also be cited later in the treatise, when the *Ordo* defines justice as 'the

6 Fowler-Magerl, *Ordines*, 62.

7 Fowler-Magerl, *Ordines*, 62, also Zuleta and Stein, *The Teaching*, xii.

8 On excommunication, especially *latae sententiae*, where the penalty was considered in effect immediately upon the act, not after legal process, among many works, Elizabeth Vodola, *Excommunication in the Middle Ages* (Berkeley and Los Angeles: University of California Press, 1986), Richard H. Helmholz, "Excommunication as a Legal Sanction: The Attitudes of the Medieval Canonists," *ZRG KA* 112 (1982): 202–18 and, recently, Bruce C. Brasington, "Differentia est: A Twelfth-Century Summula on Anathema and Excommunication," in *Canon Law, Religion, and Politics*, 107–17.

9 Hudson, *Land, Law, and Lordship*, 170–71.

power granted to another, with permission to deliver the law, and the faculty of establishing equity.¹⁰

One can also compare the *Ordo* with other civilian commentaries, for instance William of Cabriano's *Casus Codicis*. A good example is their similar treatment of the absolute necessity of the plaintiff's proving the case, even when the defendant has said nothing. Another text to consult by way of comparison is the Bolognese *Dissensiones dominorum* on the judge's role in allegations.¹¹

Canonistic sources are present to a far greater extent than in the *ordines* we have considered so far. The author often cites the *Decretum*, and directly refers to Gratian.¹² Such frequent reference to the canon law when compared, for example, with the *De edendo*, is striking, and a sign of how much the integration of civilian and canonistic procedure had progressed by 1190. As already noted, there is connection with decretist thought as well, for example the *Summa Lipsiensis*, itself influenced by an earlier commentary from the Bolognese decretist, Johannes Faventinus. There is close correspondence with Rufinus, Stephan of Tournai, and Simon of Bisignano.¹³ They are candidates for the unnamed *quidam* ('certain ones') and *alii* ('others') the author periodically mentions.¹⁴

The author, however, does not merely echo his contemporaries. A good example of divergence is his treatment of the validity of varying testimonies

-
- 10 On twelfth-century civilian discussions of equity, also comparing Martinus and Bulgarus, Ennio Cortese, "Équité e justice la dynamique bipolaire du droit au moyen âge," in *Mélanges Anne Lefebvre-Teillard*, 299–313.
 - 11 An introduction to these twelfth-century collections of disputes among the Bolognese doctors is provided by Dondorp and Schrage, "The Sources of the Medieval Learned Law," in *The Creation of the Ius Commune*, 53–57.
 - 12 Noting in particular Gratian's *causae* and application to litigation, Wickham, *Courts and Conflict*, 235.
 - 13 Rufinus, *Summa Decretorum*. ed. Heinrich Singer (Paderborn: Ferdinand Schöningh, 1902, rp. Aalen: Scientia, 1963); Stephen of Tournai. *Die Summa über das Decretum Gratiani* ed. Johann Friedrich von Schulte. (Giesen, 1891. rp. Aalen: Scientia, 1965); Simon of Bisignano, *Summa*. ed. P.V. Aimone. (Fribourg, Switzerland, 2006), hosted by the University of Fribourg. (Hereafter, these works will generally be cited as *Summa Rufini*, *Summa Stephani*, and *Summa Simonis*.) All three editions are linked online at <http://web.colby.edu/canonlaw/2009/09/24/decretum-decretists/> accessed on 30 April 2014. Unfortunately, the link to the *Summa Simonis*, the version used in this study, was down as of August, 2014. However, one can now consult the printed volume that replaced it: *Summa in decretum Simonis Bisinianensis*, ed. P. Aimone (Vatican City: Bibliotheca apostolica vaticana, 2014).
 - 14 Noting Bassianus as a 'quidam' sometimes cited by contemporary civilians in opposition to Placentinus, Gouron, "La notion de privilège," 12.

concerning a single event. Among the decretists examined, a representative, if not exhaustive sample, none takes the position of the *Ordo Bambergensis*, which specifically mentions testimony concerning homicide.

The *Ordo* also turned to the *ius novum*. We find canons from Gratian paired with recent papal decretals.¹⁵ It has long been known that these came from a decretal collection associated with the ‘Bamberg Group’ compiled in the 1180s.¹⁶ There is even reference to the 111 Lateran Council, can. 12, which states that no one under the age of 25 could receive any office concerning the care of souls.¹⁷ The author uses it to illustrate why a minor cannot be a proctor or appoint one without his tutor’s approval.

At various points, a citation from Gratian does not seem to pertain immediately to the exposition. To give one example, when commenting on the failure to summon because of a ‘common interest,’ for example the harvest, or due to a private matter, for example, a wedding, the author cites C 30 q. 5 c. 1. This canon from Gratian treats, however, clandestine marriages, whose validity greatly troubled contemporary canonists.¹⁸ This would not seem to be a very good example to support the argument in the text. Perhaps it was intended to provide a negative example, that only a valid marriage could provide an exception to summons.

Often, it appears that the author used such citations to instruct, to lead his audience to consider analogies, broader, and even contradictory readings of

15 As noted by Nörr, “Päpstliche Dekretalen und römisch-kanonischer Zivilprozeß,” 58.

16 Fowler-Magerl, *Ordo*, 105. Again, the name misleads; it is not German, but Anglo-Norman. On this decretal collection and the considerable legal activity in Anjou, for example appeals to the papal court, Jörg Peltzer, *Canon Law, Careers and Conquest. Episcopal Elections in Normandy and Greater Anjou, c. 1140–c. 1230* (Cambridge: Cambridge University Press, 2008), 69, 71 and n. 293. See also Charles Duggan, “Decretal Collections from Gratian’s *Decretum* to the *Compilationes antiquae*: The Making of New Case Law,” in *The History of Medieval Canon Law*, 249. For additional information, see again Professor Pennington’s website, accessed on 14 April 2014 at <http://faculty.cua.edu/pennington/1140a-z.htm>. In the notes to the translation in this chapter, I shall also include references to the recently-edited *Collectio Francofurtana*. As long as the ‘Bamberg Group’ remains unedited, the *Francofurtana* can give us some additional information about the letters selected by the *Ordo Bambergensis*. For a good introduction, Giesela Drossbach, “Decretals and the Schools? The *Collectio Francofurtana*,” *BMCL NS* 24 (2000): 65–77.

17 Most recently, Danica Summerlin, “Three Manuscripts Containing the Canons of the 1179 Lateran Council,” *Bulletin of Medieval Canon Law. NS* 30 (2013): 21–43.

18 Brundage, *Law, Sex, and Christian Society*, 276–77, 335–36. See also, among many studies, R.H. Helmholz, *Marriage Litigation in Medieval England*, (Cambridge: Cambridge University Press, 2007), 27–28.

his text. He periodically employs analogies.¹⁹ When reflecting on the distinction between ownership and possession, something that the earlier *ordines* have considered in some depth, the *Ordo Bambergensis* cites C 20 q. 2 c. 1 and 2. These canons treat, respectively, the tonsure of a minor and a girl under the age of twelve who willingly took the veil. In both instances, it seems that the author emphasizes by way of analogy that these actions, contrary to the canon law, may have conveyed possession but not lawful ownership.

The *Ordo* frequently refers to marriage. This reflects, no doubt, its increasing importance in both canonistic theory and practice during the late twelfth century.²⁰ The subject would thus be familiar to the audience. Perhaps the author hoped that this would then serve to extend his point and the accompanying canonistic citation to a wider legal meaning.²¹ For example, the author treats those excluded from giving testimony in either a criminal or civil case, and mentions unnamed commentators whose views, he suggests, are undermined by C 35 q. 6 c. 2, a canon noting the exception to barring of testimony when the case concerned a disputed marriage.

Like the *Practica legum*, though to a somewhat greater degree, the *Ordo Bambergensis* cites the Bible. A good example is the judgment of Daniel concerning Susanna and the Elders, which it treats at some length.²² Unlike William of Longchamp, however, our author does more than merely cite the sacred text. He occasionally reflects on the Biblical context of the law, for example, by noting that ‘the oath was instituted on account of the sacrilege of the idolatrous.’

In five places, the *Ordo Bambergensis* contrasts contemporary legal thought and practice with that of the past by using *hodie* (today). Like Biblical citations, this in itself is not unusual. As we saw in the previous chapter, the *Practica legum* also noted the ‘new law’ issued by Pope Lucius III. The *Ordo Bambergensis* invokes *hodie*, however, in a variety of contexts, from contrasting

19 Arguing that such reasoning was common in Innocent III’s later decrees on inquisitorial procedure, McAuley, “Canon Law and the End of the Ordeal,” 493.

20 In addition to many studies by James Brundage, see Peter Landau, “Papst Cölestin II und die Anfänge des kanonischen Eheprozessrechts,” *De Processibus Matrimonialibus. Fachzeitschrift zu Fragen des kanonischen Ehe- und Prozeßrechtes* 13 (2006): 57–71.

21 On the difficulties of recovering the specific context of a legal text, in this case early-medieval formulae, and the hopes of drawing ‘the general out of the specific,’ Alice Rio, *The Formularies of Angers and Marculf. Two Merovingian Legal Handbooks* (Liverpool: Liverpool University Press 2008), 35.

22 For a thorough discussion, in addition to the works cited below in the commentary, Mausen, *Veritatis adiutor*, 650–51 and. n. 177. The story was extensively treated by twelfth-century canonists.

how anticipatory delays are handled to the power of the arbiter. Just as our author was aware of divergent interpretations between civil and canon law, the latter signaled by the periodic references to *alii* and *quidam*, he was sensitive to the difference between the commands of older and newer law and procedure.

The *Ordo Bambergensis* treats many topics either more thoroughly or even uniquely when compared to the *ordines* we have considered.²³ Among these are the exclusion of Jews and domestics from testimony and the distinction between error of law and error of fact. The author's consideration of hearsay and how a false witness sins differs as well from the other *ordines*. Other examples include distinguishing between the judge's office and merit and how the ordinary judge could be recused.

Numerous passages were likely relevant to a contemporary reader. For example, we may note the treatment of when members of a household could be permitted to testify in civil disputes involving two churches. Equally useful in court was consideration of what to do when a witness was challenged for having himself committed a crime.

For the development of jurisprudence, nothing in the *Ordo* was more significant than its consideration of presumption. The author appears to have been the first canonist to do so.²⁴ While presumption of proof has been latent in arguments we have already encountered, for example that the burden of proof lay on the plaintiff, not the defendant (Dig. 22.3.2), it is only here in our treatise that it now receives extended consideration.²⁵ Given the importance of presumption, for example concerning innocence, in modern legal procedure,²⁶ our treatise makes a profound contribution to the law.

23 On the treatise's consideration also of *res litigiosa* and *laesio enormis*, see below and also the Conclusion.

24 Motzenbäcker, *Die Rechtsvermutung*, 68–69. On the importance of the development of theory concerning presumptions, see also Gouron, "L'enseignement du droit civil," 193–94.

25 In addition to the scholarship cited below in the translation, a concise introduction and study of presumption in medieval law is provided by Hanns Hohmann, "Presumptions in Legal Argumentation from Antiquity to the Middle Ages," with a response by Mari Lee Mifsud, accessed at <http://www.trentu.ca/org/ossa/p30.htm> on 12 August 2015. Hohmann treats the origins of presumption in the classical civil law, for example a father's assumption that his son, missing in war, was dead. He also considers the late twelfth-century jurist Pilius, taught by Placentinus, but none of the *ordines*.

26 Among various studies, Kenneth Pennington, "Innocent Until Proven Guilty: The Origins of Legal Maxim," published earlier in several versions and accessed at <http://faculty.cua.edu/pennington/Law508/InnocentGuilty.htm> on 12 August 2015. Like Hohmann, he does not treat the *ordines* beyond a few, general comments.

Like the *Practica legum*, the *Ordo Bambergensis* probably did not reach a wide audience. It is also overshadowed by two works that would soon set the standard for ecclesiastical procedure: the treatises of Richardus Anglicus and Tancred of Bologna.²⁷ Nevertheless, the *Ordo Bambergensis* deserves consideration in its own right. It demonstrates the scope and sophistication of procedural theory in the Anglo-Norman world on the cusp of the thirteenth century. Equally, it indicates how far ecclesiastical procedure had progressed in the four decades since Bulgarus had answered Haimeric's questions about how to try a case.

Concerning the Initial Charge (Cap. 1)

Since (some) things are preparatory to judgments,²⁸ like a prelude (for example the initial charge before the summoning to court) let us first see about bringing the charge.²⁹ For, according to natural order, the charge comes before the summons.³⁰ The charge ought to be made according to reason, specifically, not generally.³¹ It matters not whether one brings an invalid charge or makes it maliciously, that is in a perfunctory fashion or obscurely, since it is not called a charge because it either was made incorrectly or deserves to be rendered void, as in C 1 q. 7 q. 24 and D 33 c. 14.³² Indeed, one says that nothing has happened, as in C 30 q. 5 c. 1. Thus, the charge must be brought 'reasonably',³³ that is to say with reasonable documents, as in C 5 q. 2. c. 1. We have 'reasonable documents' so that all the chapters and articles concerning which the defendant must be tried may be brought, since bringing the charge must be in the open, lest it deceive through obscurity, as in D 4 c. 2. The charge ought to be similar to this

27 Richardus may have composed his *ordo* at about the same time as the *Ordo Bambergensis* and subsequently revised it. It survives in multiple versions. Tancred's work is even more widely distributed. For a review of the scholarship on both and their manuscripts, see <http://faculty.cua.edu/pennington/1140a-z.htm> accessed on 13 November 2015.

28 In general, Nörr, *Prozessrecht*, 59.

29 Litewski, *Zivilprozeß*, 226, comparing also *De edendo* and *Practica legum*, cap 7. See above, chapters 3 and 4.

30 For these opening sentences, Placentinus, *Summa codicis*, Cod. 2.1: Et quia iudiciorum quaedam sunt praeparatoria et multa praeueniunt iudicia tanquam quaedam praeludia...

31 On the distinction between general and specific, Meyer, *Distinktionstechnik*, 168.

32 D 33 c. 14 in the edition; actually D 23 c. 14.

33 Compare the *De edendo* here.

legal constitution, that it be manifest, for otherwise it might lead the accused into the labyrinth, the snare of error, into damage and danger to his right if he were compelled by an incomplete charge to answer in court. That the charge ought to be reasonable and manifest is demonstrated by C 5 q. 2 c. 4, which states that the summons must not be made within a brief period nor before the defendant has been notified about it in writing,³⁴ so that he may come to respond to this accusation of guilt.

All accusations must be declared; all chapters of the law according to which they are being tried must be set forth. Therefore, the charge is nothing other than to declare the form of the future trial. A hearing held against this concession must be considered void, as in C 3 q. 3 d.p.c. 4.

The plaintiff ought to bring the charge so that the defendant may deliberate whether to yield or contest. If the accused should decide to concede, then let him yield. If, having been advised, he decides to contest the charge, let him come to oppose it, as in C 3 q. 3 d.p.c. 4. If anyone offers a written complaint,³⁵ the judge ought not to accept it³⁶ unless the plaintiff first sets forth the surety established in the *Authenticum*,³⁷ which states: 'let the judge make provision that the charge not be made to the defendant unless the plaintiff first offers surety, which ought to last to the conclusion of the trial. If the plaintiff is convicted as having unjustly moved to have a trial, then let him restore to the defendant the expenses of the trial and a tenth of the amount contained in the original bill.'³⁸ If he cannot provide surety, then let him take an oath.'³⁹ When surety has been given, the one accused who has not accepted the bill is summoned, unless the surety is tendered, as treated in C 3 q. 3 d.a.c. 4. This is found in the *Authenticum* at Cod. 3.9.⁴⁰ It is permissible, however, to emend and

34 Litewski, *Zivilprozeß*, 229.

35 On the *libellus conventionalis*, Berger, *Encyclopedic Dictionary*, 561–62. Also compare again the *De edendo* here.

36 Compare *Olim edebatur actio* §230 and *Practica Legum*, cap. 12, on which see Litewski, *Zivilprozeß*, 248 and n. 294.

37 Nov. 112.c. 2. Von Schulte notes that this is not a literal citation of the text but an 'excerpt.' See also Kaser, *Zivilprozeßrecht*, 571–574 and, for the *Ordo* here, Litewski, *Zivilprozeß*, 252.

38 On the trial's expenses, *expensae litis*, Litewski, *Zivilprozeß*, 569 n. 1, comparing Bulgarus and the *De edendo*.

39 On the *iuratoria cautio*, an oath strengthening the obligation, Berger, *Encyclopedic Dictionary*, 384. For usage earlier in the twelfth century at the Council of Northampton (1164), discussed above in chapter 3, Duggan, "Roman, canon and common law," 381 and n. 21.

40 Nov. 53.3. See also C 3 q. 3 d.a.c. 4§5.

change the specific charge: to emend it, that if less is first claimed then more may be claimed later, as found in the canon law at C 12 q. 1 c. 18.⁴¹ According to the civil law, he can change the charge as long as he claims coevals, the benefit of bringing a charge preserved for the defendant. He is equally instructed to respond to the second charge as he had been prepared for the first. Concerning the change of this charge, nothing is found in the canons.⁴² By the canon law, it is charged by a suit of this sort but not required, as stated in the *Extrav.* of Alexander, *Dilecti*,⁴³ nor is it pronounced for some specific charge, save for ingratitude, by which an ungrateful freedman of the church is recalled into servitude, as in C 12 q. 2 cc. 62–63.⁴⁴

41 This citation of Gratian is the first of those noted in the introduction to this chapter that does not relate explicitly to the argument. Using the *propositum*, the vow to enter and observe religious life, to explain the changing of a charge in legal procedure is an interesting analogy. That twelfth-century canon law had to take the question of the *propositum* into account, particularly given the rise of the new orders, for example the Cistercians, which attracted many who wanted to leave what they considered less austere foundations to pursue a purer life, is discussed by numerous scholars, for example Dannenberg, *Das Recht der Religiösen* and, with particular attention to theology, Markus Schürer, "Das *Propositum* in religiös-asketischen Diskursen. Historisch-semantische Erkundungen zu einem zentralen Begriff der mittelalterlichen *vita religiosa*," in *Oboedientia. Zur Formen und Grenzen von Macht und Unterordnung im mittelalterlichen Religiosentum*, ed. Sébastien Barret and Gert Melville (Münster, Hamburg, London: LIT Verlag, 2005), 99–128. In the *Ordo Bambergensis*, however, the *propositum* is used rather in reverse to explain a legal procedure.

42 Note the contrast of canon and civil law. See Litewski, *Zivilprozeß*, 242.

43 On the 'extravagantes,' papal letters postdating Gratian's *Decretum* and, hence 'wandering around,' Gilchrist, "Canon Law," 245. This decretal was addressed to the judges delegate, including Bishop Bartholomew of Exeter, concerning a dispute between Guiseburn priory and the archbishop of York Pope Alexander III (JL 13934, WH 356, x 2.1.6). Adrian Morey, *Bartholomew of Exeter, Bishop and Canonist: A Study in the Twelfth Century* (Cambridge: Cambridge University Press, 1937), 51 notes that the judges were instructed only to consider the fact of the charge: *rei veritatem inquirere*. See also the *Collectio Francofurtana* 40.20, and Landau, "Pacta sunt servanda," 463, reprinted in his *Europäische Rechtsgeschichte*, 768 and n. 33 and, among other studies, Nörr, "Päpstliche Dekretalen in den *Ordines iudiciorum* der frühen Legistik," 3–4 and *Prozessrecht*, 91.

44 On ingratitude, the *accusatio liberi ingrati* in the classical civil law, Berger, *Encyclopedic Dictionary*, 501. Ingratitude could also levelled against an advocate undertaking a suit against a church from which he received a benefice. See Brundage, "The Ethics of Advocacy," 459–60, also his essay "The Ambidextrous Advocate: A Study in the History of Legal Ethics," in *Ins Wasser geworfen*, 52 concerning an advocate holding benefices from

Concerning the Summons to Court (Cap. 11)

Although each man is permitted by proper order and legal rule to summon someone to appear in court, nevertheless this summons ceases for certain reasons: sometimes because of the persons involved,⁴⁵ sometimes because of the matter at dispute.⁴⁶ It may cease by reason of the persons involved for the sake of divine law, and sometimes because of human law.⁴⁷ An example of the former is when the priest celebrates mass,⁴⁸ for then it ceases out of reverence for the person involved and for the sake of religion, as found in C 7 q. 1 c. 16 and *De Con.* D 1 c. 57. In secular law this happens, for example, with a freedman, and a son who shall not summon, respectively, the patron or father unless by means of a requested privilege.⁴⁹ The persons of father and patron ought to be considered sacred and venerated,⁵⁰ as found in C 12 q. 2 c. 58, C 12 q. 2 d.p.c. 57, C 12 q. 2 cc. 64–65, since the sons of freedmen manumitted by the group or body neither summon the patron church, as in the aforementioned canon, nor do they call the community, yet they are able to summon individuals to court, as in C 12 q. 2 d.p.c. 57.⁵¹

Summons to court ceases by reason of business at hand for the sake of public utility,⁵² as in war,⁵³ as found in C 23 q. 8 c. 15. Indeed, at any time, even during Lent, preparation for wars to defend the country and laws must not be avoided, and thus it is evident that in this instance there is no legal summons. Sometimes there is no summons due to the common

two foundations. For twelfth-century decretist thought, Gilchrist, “The Medieval Canon Law on Unfree Persons,” 281, 297–300.

45 On the *personae exceptae*, Litewski, *Zivilprozeß*, 255 and n. 385.

46 On *ratio personae* and *ratio materiae*, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.121–28.

47 Note again the distinction between sacred and civil law.

48 A good example of this *ordo*’s consideration of canon law, on which see Litewski, *Zivilprozeß*, 257 n. 412, comparing *Olim edebatur actio* §233.

49 Dig. 2.4.4.1 See Kaser, *Zivilprozeßrecht*, 222 n. 15, also Dig. 2.4.25.

50 Litewski, *Zivilprozeß*, 257 and n. 417–418, comparing *Olim edebatur actio* §233.

51 On *collegium*, though without reference to the *Ordo Bambergensis*, Peter Landau, “Was war um 1300 ein Kollegium?,” reprinted in his *Europäische Rechtsgeschichte*, 429–30 and, in the context of the juridical person in the civil law, also Emmanuelle Chevreau, “Quelques remarques sur la continuité des ‘personnes juridiques’ en droit romain classique,” in *Mélanges d’Anne Lefebvre-Teillard*, 217–31.

52 Comparing also *Olim edebatur actio* §243, Litewski, *Zivilprozeß*, 255 and n. 387.

53 Litewski, *Zivilprozeß*, 265 n. 408, noting also *Olim edebatur actio* §233.

interest, for example the harvest,⁵⁴ according to the secular laws;⁵⁵ at other times, it is due to a private matter, as attending to a funeral,⁵⁶ as found in C 13 q. 2 c. 28, or having married, as in C 30 q. 5 c. 1.⁵⁷ If for three days, as it states, he ought to persevere in prayer there with his wife, and it is proven the wife is staying (with him), he cannot be summoned to court. The summons to court cannot take place by reason of time, as in C 15 q. 4 c. 2. It also is not in effect by reason of illness, as in C 3 q. 6 c. 8 and D 18 c. 1.⁵⁸ Another reason is plunder, since the one who has been deprived of his goods is not summoned until that time when he can enjoy their restitution as much as he had suffered from their loss,⁵⁹ as found in C 3 q. 2 c. 1–3.⁶⁰ Another reason is a necessary journey, as in C 34 q. 1 c. 4,⁶¹

-
- 54 Comparing here *Olim edebatur actio* §322, Litewski, *Zivilprozeß*, 256 and n. 407.
- 55 Berger, *Encyclopedic Dictionary*, 611, noting that the *Oratio Marci* (Aurelii) pr, prohibited *vocatio in ius* during harvest or vintage unless when the plaintiff might lose his right. In those circumstances, it was permitted by reason of emergency. (Dig. 2.12.1pr.) This also was found in the *Expositio* to the *Liber Papiensis*, on which see Radding, *Corpus iuris civilis*, 181.
- 56 Litewski, *Zivilprozeß*, 256 n. 410, comparing *Olim edebatur actio* §233.
- 57 Reading *duxit* for *dixit* in the edition. The text from Gratian does not seem immediately relevant, for it discusses the difference between valid and clandestine marriages, a subject increasingly concerning the Church, as we see in decretals from Pope Alexander III and his successors. In general, Brundage, *Law, Sex, and Christian Society*, 335–37. Perhaps the author is arguing that only a valid marriage would provide this exception to the summons.
- 58 This canon in Gratian does not obviously apply, for the *Ordo* is treating illness (*invalidudo*). Perhaps the author is adding, without discussing it in his text, an additional example of dispensation from the legal order. On the *sententia diffinitiva* see, in addition to the *ordines* already considered in this study, Müller, *Päpstliche Delegationsgerichtbarkeit*, 1.99–100.
- 59 On the multiple meanings of *restitutio*, comparing Rufinus and Stephan of Tournai, Knox, “The Problem of Academic Language,” 117–20.
- 60 These texts reflect the *exceptio spoli*, as noted in the Introduction, an important procedural innovation advanced by the Pseudo-Isidorian texts. On the form of argument here (*aliud . . . aliud*), though without reference to our text, Meyer, *Distinktionstechnik*, 165.
- 61 Incorrectly C 33 in the edition. Gratian’s text does discuss travel, and the force of necessity, a key factor in all canonistic discussions of dispensation due to particular circumstances that went as far back as the decretals of Pope Innocent I. The necessary trip is, perhaps, a crusade. The status of a marriage between a prisoner-of-war and his wife had already been considered by the civil law, on which see Brundage, *Law, Sex, and Christian Society*, 32 and n. 106, citing Dig. 48.5 14(13) 7. The wife’s sexual relations did not mean adultery, for the marriage had been dissolved by the husband’s capture. Obviously, this differed from the canon law of marriage as understood by the time of the *Ordo Bambergensis*. She must remain unmarried.

provided that some understand that these stays, called 'restitutory,' may be no shorter than six months and no longer than one year, as in C 3 q. 2 c. 5. Others say that shorter and longer stays can be granted when the case has been judicially examined, as in C 3 q. 2 c. 8.⁶²

Concerning Stays and Delays⁶³ (Cap. III)

With charge and summons made, stays are then offered. Some are restitutory, others deliberative.⁶⁴ We spoke above about the latter. Some relate to the summons, as in anticipation, others are necessary, for preparation, and still others are judicial.⁶⁵ Whether the charge is contested or not, delays concerning the summons are not permitted when the judge cites the absent party with three edicts or a single peremptory edict in their place,⁶⁶ with a period of thirty days assigned for each party to appear in court,⁶⁷ as in C 24 q. 3 c. 6.⁶⁸ Others call these delays anticipatory.⁶⁹ These are given variously according to the variety of persons to whom the stay is granted. They are granted in one way to persons in sacred orders, that is bishops, priests, and deacons, in another to lesser clergy and laymen under them. Bishops, priests, and deacons are granted delays of one month or, if just cause should intervene, then two months or more. This

-
- 62 Again, the text from Gratian extends the author's point, for it is not about stays (*induciae*) but, rather, *restitutio in integrum*, vital to proper judicial process, and a subject considered periodically in previous chapters.
- 63 On the separate evaluation of *dilatio* and *productio*, Litewski, *Zivilprozeß*, 368 and n. 203, also found in *Olim edebatur actio*, but not in the other *ordines* treated in this volume.
- 64 The *Ordo* compares well here with commentary on C 3 q. 2 by both the *Summa Stephani* and *Summa Rufini*.
- 65 Meyer, *Distinktionstechnik*, 256 n. 843, citing the phrase in Richardus Anglicus' later *Ordo*.
- 66 Compare Cod. 3.1.13.2, also Pennington, <http://classes.maxwell.syr.edu/His381/procedure.htm> accessed on 28 January 2012 discussing the *Summa Stephani*, C 2 q. 1 s.v. *an in manifestis*, on which see also Fowler-Magerl, *Ordo iudiciarius*, 27–28 n. 76. On *Olim edebatur actio* §659, Litewski, *Zivilprozeß*, 281 and n. 76 also 282 n. 100.
- 67 Litewski, *Zivilprozeß*, 284 and n. 116, comparing also *Olim edebatur actio* §621.
- 68 For the classical law, Jolowicz, *Historical Introduction*, 405 and n. 6 and, for a slightly earlier text to compare with our *Ordo*, Bishop Gilbert Foliot, Ep. 200, a letter from April, 1169 to Pope Alexander III concerning Gilbert's appeal against the archbishop. See Morey and Brooke, *Letters and Charters*, 273 and Taliadorus, 'Law and Theology.'
- 69 Compare here the *Summa Rufini* on C 3 q. 2. This formulation is not found in the other *ordines* considered in this study. See also Litewski, *Zivilprozeß*, 366 and n. 165.

is evident concerning bishops from C 4 q. 5 cc. 1–2,⁷⁰ and C 5 q. 3 c. 1. That the same delay might be given to priests and deacons is evident from that decree, because they are connected in C 15 q. 7 c. 5. Concerning other clerics, these delays are guided by C 5 q. 2 c. 2. Nevertheless, you should understand these delays obtain when the parties live in the same diocese. If they live at a distance, then let them be granted more flexible periods of time so that synodical or metropolitan examination may be requested.⁷¹

When the suit is contested, the judge grants, in order, necessary delays so that the party may find documents or witnesses, as in C 3 q. 3 d.p.c. 4. The judge ought not to do this unless, having heard the case once or twice, a most urgent and pressing reason demanded it, as found in the same *dictum* of Gratian. No trick of prolonging the proceedings must grant a delay. If the delay has been requested so that documents and witnesses may be obtained in the same province where the trial is being held, it is limited to three months; in adjoining provinces, the period is six months. Nine months are assigned for overseas provinces, as found in the same canon.

Other stays are called preparatory which, in canon law, because of greater piety, are twice as long as those granted by the civil laws. The civil laws grant a period of only nine months, whereas the canons give a year and a half.⁷² Where the civil laws give six months, the canons a year, and when three months, the canons grant six, as in C 3 q. 3 c. 2.⁷³ One asks, however, how these delays may be offered after the beginning of the trial, when they may be enjoined, as in C 5 q. 2 c. 4:⁷⁴ 'If primates are charged then, after the bishops have been summoned, they should be informed, so that, thus prepared, they may come to respond.' To this we say that delays of this kind are reserved to the judgment of the one hearing the case so that, if it seems to him more suitable, he may have them presented before the beginning of the trial, as stated in the preceding decree: 'preparatory' delays may be joined to anticipatory delays without any

70 The source is uncertain. There is no C 4 q. 5 c. 2.

71 Litewski, *Zivilprozeß*, 80 nn. 11–12 (noting also archbishops and their suffragans in the *Practica legum*, cap. 21), and n. 20 on synodical jurisdiction here in our treatise. On synodical jurisdiction in the late twelfth century, among various studies, Bruce C. Brasington, "The *Distinctiones Cantabrigenses* (Cambridge, UL Add. 3321.1): Authority, Power, and Jurisdiction in a Twelfth-Century Commentary on Gratian's *Decretum*," *ZRG KA* 127 (2011): 112–42.

72 On this distinction, Litewski, *Zivilprozeß*, 367 and n. 194.

73 The edition incorrectly gives c. 1.

74 Again, this is close to Rufinus' *Summa*.

alteration.⁷⁵ However, if he judged it better that they be given after the trial has begun, then let him do what he considered with prudent counsel.

As I said above, you should know that anticipatory delays in neighboring provinces are two months long, as in C 4 q. 5 c. 1, and in distant provinces, three or more, as in C 5 q. 3 c. (1). Today, however, anticipatory delays are regulated according to the health and age of the persons, as well as considerations of distance, time, as in C 3 q. 3 c. 1 and in (Comp. 1.),⁷⁶ and in Dig. 2.12.1pr. Some say these delays must be considered by those accused in criminal cases.⁷⁷ Concerning judicial delays lasting four months,⁷⁸ let three things be considered. The defendant enjoys the four-month period if granted by the judge. Even if not granted, however, it is understood as tacitly given by the law.⁷⁹ However, because of the type of case, the magnitude or severity of judgment, contumacy, respect for the person accused or, instead, by whom or how the judgment was made, the judge can shorten or lengthen the time for the defendant.⁸⁰ This is according to the civil laws. Concerning these delays, however, we read nothing in the canons.⁸¹

Concerning Punishment of Those Contumaciously Absent (Cap. iv)

It happens sometimes that the defendant is absent by reason of necessity, and at other times through negligence, choice, or from contumacy.⁸²

-
- 75 Von Schulte, *Der Ordo*, 11 gives *sine ulla interpolatione*. Possibly *interpellatio* (appeal) should be read instead, on which see Dig. 50.16.88.
 - 76 To Archbishop Henry of Rheims, a decretal from 1171: Pope Alexander III (JL 8065, x 2.28.5). On this, Stanley Chodorow, "Custom, Roman Canon Law, Economic Interests in Late Twelfth-Century England," in *Grundlagen des Rechts*, 292.
 - 77 Compare, here, again the *Summa Rufini* at C 3 q. 2.
 - 78 Litewski, *Zivilprozeß*, 540 and n. 43, with reference to Bulgarus, the *De edendo*, and *Olim edebatur actio* §591.
 - 79 This discussion of the law 'tacitly' giving this delay to the defendant is not found in the other *ordines* examined for this study. On *tacite* in the classical law, Berger, *Encyclopedic Dictionary*, 729. It seems almost an expression of equity, which is never treated by our other treatises. See also below.
 - 80 Compare Dig. 42.1.2. On the judge's ability to shorten or lengthen such delays, Kaser, *Zivilprozeßrecht*, 384 for the classical law.
 - 81 Litewski, *Zivilprozeß*, 542. This is a distinction not noted by the other *ordines*.
 - 82 Comparing the *De edendo* here, Litewski, *Zivilprozeß*, 275 and n. 5.

When absent by necessity, he ought to send a representative to the synod who must not only state the reason but also prove it,⁸³ as in C 5 q. 3 c. 1 and C 4 q. 5 c. 1. If legally injured in some way during the period of absence, he is to be restored to all things as they stood before,⁸⁴ as in C 7 q. 1 c. 3, C 16 q. 3 c. 13, and C 33 q. 1 c. 1.⁸⁵ One condemned due to negligent or willful absence is able to appeal within ten days;⁸⁶ should he come later he will be heard only with difficulty, as in *Extrav.* (1 Comp. 4.19.3), to the bishop of Exeter:⁸⁷ 'If some appeared who wished to challenge a legitimate marriage, and could, it should be asked whether at the time when the couple married these accusers had been silent and had recognized the man and woman should be united. For, if at the time of the marriage, it happened that they had known the couple and had been silent, it would be burdensome to hear them further on the matter.' Furthermore, when someone frequently admonished about negligence or temerity neglects to correct himself,⁸⁸ he deserves first to be reproached, then suspended; if admonished a third time, he should be excommunicated and, finally, removed from orders, as in C 27 q. 1 c. 18, D 74 c. 8, D 50 c. 21, D 84 c. 1, and C 7 q. 1 c. 24. However, after this humiliation, a man cast out of orders by such an offense is easily restored, as in the aforementioned D 50 c. 21, unless there be some suspicion that his contumacy is connected to a greater crime, as the aforementioned canon indicates. One imposes a penalty of this kind as much on an individual as

83 On sending a representative, Litewski, *Zivilprozeß*, 276 and n. 13, comparing also the *De edendo*.

84 A reference to *restitutio in integrum*. See Litewski, *Zivilprozeß*, 527.

85 Again, the *Ordo* illustrates process by referring to a canon in Gratian that concerns marital relations. There, the husband's frigidity is treated as injury and relations between husband and wife as a kind of legal process. On Gratian and the decretists, notably Stephen of Tournai and Huguccio of Pisa, Brundage, *Law, Sex, and Christian Society*, 290–92.

86 Comparing here the *De edendo*, Litewski, *Zivilprozeß*, 509 and n. 268.

87 Von Schulte, *Der Ordo*, 12 n. 1 comments that this title is not in the *Compilationes antiquae* nor is the decretal received by the *Liber Extra*. It is found in several early decretal collections and 1 Comp. 4.19.3: Pope Alexander III (JL 14214). See Caillmer, *Le Droit civil*, 179 and n. 2, who used it to date the treatise. On this letter, Brundage, *Law, Sex, and Christian Society*, 341 and n. 80, discussing Alexander's principal of equity applied to this difficult case. Again, marriage illustrates the procedural point, here that there should be no rush to judgment when a cleric is accused, condemned, and, finally, defrocked. The analogy is effective. With both troubled marriages and clergy, discretion is clearly necessary.

88 On the *denunciatio evangelica*, see the Introduction.

on many, as in D 100 c. 1,⁸⁹ if there is no danger threatened by his contumacy. When his contumacy grows so great that he cannot be disciplined by the church, the secular powers may coerce him, as in C 11 q. 1 cc. 18–19,⁹⁰ C 3 q. 4 c. 8.

When the defendant is contumaciously absent before the trial is contested, he is deprived of possession, (as in) D 81 c. 16, and his opponent placed in it,⁹¹ (as in) D 74 c. 9, so that the defendant, so bound, at least may then come within a year to appear before the judge, offer surety, receive possession, and undergo judicial contest,⁹² as in the aforementioned canon (D 74 c. 9), and C 11 q. 3 c. 36. After one year,⁹³ his voice may not be heard, as in the same canon, C 11 q. 3 c. 36. Here I do not speak about ownership, but about possession since, after a year, his opponent, as it were from the second edict, becomes the possessor, as in C 20 q. 2 cc. 1–2.^{94, 95} However, as the decretists say,⁹⁶ whether the trial is contested or not, if the one cited as contumaciously absent did not come, he is excommunicated;⁹⁷ if he should then hold the excommunication in contempt, etc., he shall be condemned not only for contumacy but also concerning the property.⁹⁸ That he ought to be excommunicated is held in C 4 q. 5 c. 1 and C 5 q. 2 c. 2; his condemnation also concerning the principle case or crime is shown from C 3 q. 9 c. 10 and in the aforementioned C 4 q. 5 c. 1 and C 24 q. 3 c. 6, the latter also denying the remedy of appeal.⁹⁹

89 This had already concerned patristic writers, for example Augustine when writing about the Donatist schism. Conveyed by his letters and treatises and received by canonical collections, we find this understanding of discretion when punishing in Ivo of Chartres' treatment of dispensation, on which see Brasington, *Ways of Mercy*.

90 The *Ordo* actually cites them in reversed order.

91 On *missio in possessionem* here, Litewski, *Zivilprozeß*, 286–87 and n. 142, comparing also *De edendo* and *Olim edebatur actio* §93–316.

92 On 'judicial contest,' *cognitionalia certamina*, Cod. 7.39.8.8.3. For the classical law, Kaser, *Zivilprozeßrecht*, 576 n. 53–54, also Pennington, "Roman Law in the Papal Curia," 246–47 and nn. 61, 63, noting Cod. 7.39.8.3 and Nov. 115 c. 2.

93 Litewski, *Zivilprozeß*, 288 and n. 156.

94 Again, an analogy. A minor may have possessed the tonsure but, as it was not legal, he did not "own" it.

95 The minor may have taken a wife, but, as this was illegal because he was not of age, it was possession, not ownership.

96 Compare *Summa Rufini* and *Summa Stephani* on C 4 q. 5 c. 1 and C 5 q. 2 c. 2.

97 This is not found in the other *ordines* we have examined. See Litewski, *Zivilprozeß*, 296 and n. 267, also noting English examples in Sayers, *Papal Judges Delegate*, 74–75.

98 On the distinction here between *actio in rem* and *actio in personam*, Litewski, *Zivilprozeß*, 289 and nn. 174–175.

99 On *remedium*, Litewski, *Zivilprozeß*, 487, 490 n. 5 comparing also the *De edendo*.

However, if in either a civil or criminal case he was condemned by false documents or witnesses and should desire to come within a year of his excommunication to prove his innocence under oath, then let him be heard concerning the principal case. Yet he shall still be held condemned concerning his contumacy. If he should delay longer than a year, however, he is condemned with all possibility of remedy removed, as in C 11 q. 3 c. 36 and C 11 q. 3 c. 12. This text also obtains when the person condemned did not comply and thus was excommunicated. He is then allowed up to one year to prove he was convicted falsely and to assert his innocence. If, however, the convicted man complied with the sentence, then he is received in court for up to twenty years, as in Cod. 9.22.12. However, if he complied with neither the excommunication nor the sentence of judgment,¹⁰⁰ let him not be heard further, and especially, if he is a cleric and, while excommunicated, presumed to celebrate divine services,¹⁰¹ as in D 63 c. 24 and C 11 q. 3 c. 6, unless dispensation be applied,¹⁰² as in C 2 q. 5 c. 9 and C 11 q. 3 c. 109.

If one asks by what penalty the defendant must be punished when it appears to the judge that the plaintiff should be placed in possession because of the defendant's contumacy, we say that concerning clerics and their affairs rigor and severity are neither required nor enforced but, when this does not threaten justice, the defendant ought to be admitted to court and patiently endured when, having returned, he binds himself with surety before the judge.¹⁰³ In the civil law, when the defendant is contumaciously absent from the initial hearing, and the reason is unclear to the judge, the plaintiff is placed in possession and is made possessor.¹⁰⁴ If the reason is evident then, with the illegal absence made public, let a sentence be declared not only for the plaintiff but also for the defendant, since the presence of God fills the place of the absent defendant and the remedy of appeal in both cases is denied to both parties.¹⁰⁵ When the

100 On the various meanings of *sententia*, Litewski, *Zivilprozeß*, 456 and n. 75.

101 Mausen, *Veritatis adiutor*, 654 and n. 186.

102 The *Ordo Bambergensis* appears to be unique here, on which see Litewski, *Zivilprozeß*, 280 n. 68.

103 Compare a letter of Alexander III to the bishop of Hereford (JL 9012, X 2.14.1). This illustrates the *Ordo's* familiarity with contemporary decretals. On *possessio* and the *causa rei servandae* note also *De edendo* in chapter 3.

104 In general, Schlinker, *Litis contestatio*, 248–49.

105 Compare Cod. 3.1.13.4. For this text, Kaser, *Zivilprozeßrecht*, 521 n. 19. On its use as well in the *ordo* 'Iudicium est trinum personarum,' Fowler-Magerl, *Ordo*, 299, also Litewski, *Zivilprozeß*, 285 and n. 128, comparing also other chapters in the *Ordo Bambergensis*, cap. viii, xvii, and *Olim edebatur actio* §626.

plaintiff has been absent in order to weary the defendant with multiple delays and the three-year limit is coming to an end,¹⁰⁶ if there has not been sufficient effort to determine the reason, the judge absolves the defendant from the sentence,¹⁰⁷ provided he is also denied the opportunity to pursue the case further, as in C 4 q. 5 c. 1. If the plaintiff proved, however, that on the appointed day he had not been unwilling to appear but unable then, with the judge condemning the defendant, the expenses are charged to the defendant under oath. If, however, the reason for the absence is clear, the judge not only absolves the defendant who is present but also condemns the absent plaintiff (even if he has a better case), with the expenses incurred by the defendant concerning the sentence to be opposed as a counter-claim to the plaintiff,¹⁰⁸ in both cases with benefit removed (as stated) by the *Authenticum*.¹⁰⁹ However, if someone is sued concerning immovable property which he possesses on behalf of another, he can immediately be summoned to court and the judge should set a definite time when he can notify the owner so that he either comes to the place where the property is located, or sending a proctor on his behalf, may oppose the plaintiff's accusation; however, if he neither comes nor sends someone as a representative, from that day when the defendant was first sued the prescription is interrupted.¹¹⁰

When the case has been summarily examined and the defendant has not appeared as required by law, the plaintiff is placed in possession, with all charges reserved to him concerning the principle question.¹¹¹ They say the same concerning moveable property, namely that he can name the owner before the judge with, however, the property first placed in deposit or after suitable surety has been offered, especially when the person naming the owner is himself suspected of having committed a crime. Others say that he is not permitted to name the owner but ought to restore the property to the plaintiff, especially when the properties could be sold by all who hold them and have the ability to restore, though they

106 Comparing here the *De edendo*, Litewski, *Zivilprozeß*, 291 n. 197.

107 Litewski, *Zivilprozeß*, 286 n. 142, also 481 n. 432, comparing *De edendo* and *Olim edebatur actio* §637.

108 Cod. 3.1.13.2b. The *Ordo* gives *obiiciendae* instead of *excipiendae*. The sense, however, appears to be the same, that the counterclaim of an exception is being made. See also Kaser, *Zivilprozeßrecht*, 613 n. 62.

109 Von Schulte, *Der Ordo*, 14 n. 1 cites Cod. 7.43.8. I am uncertain about this.

110 On interruption and prescription compare especially here the *De edendo*.

111 See Landau, "Rechtsfortbildung," 88 and Nörr, "Päpstliche Dekretalen," 63.

do not possess.¹¹² When, however, from personal debt he is sued and has moveable property, or property that ‘moves itself,’¹¹³ let him take care of the debt and stay on the path of equity.¹¹⁴ If he does not have or cannot dispose of moveable property, the plaintiff is placed in possession of immoveable property according to the amount declared¹¹⁵ and, though the defendant should return later, nevertheless he may not be heard, unless all damages be restored to the plaintiff and he offer a suitable suretor to the presiding judge.¹¹⁶

Concerning Property Sequestered in a Pending Dispute¹¹⁷ (Cap. v)

It is ‘property in a pending dispute’ when a question between the possessor and claimant is brought before the judge concerning ownership and owner. When the case is being tried concerning ownership, not possession, the property ought in no way pass to any person until the case is heard, as in C 11 q. 1 c. 50. Nevertheless, that canon is to be so understood that the property in the pending dispute only then ought to be sequestered from the possessor when he is considered suspect of a crime, as in C 3 q. 3 c. 9.¹¹⁸ It can then be understood when neither was in possession; or you might also say no one, namely, no claimant, ought to receive possession of a property in a pending dispute. I do not say ‘possessor,’ as in C 16 q. 5 *volumus*.¹¹⁹ You might thus say: ‘I granted my property to my *colonus* or tenant for cultivation, yet a case concerning its ownership is moved before the judge.’¹²⁰ The canon says that the property is in the

112 Compare Dig. 10.4.5.6. On this, Kaser, *Zivilprozeßrecht*, 388 n. 28–29. The ‘others’ are uncertain.

113 On *se moventia*, see Berger, *Encyclopedic Dictionary*, 680, for example slaves or cattle.

114 Nov. 53.4.1. See Kaser, *Zivilprozeßrecht*, 620.

115 Litewski, *Zivilprozeß*, 290, comparing also the *De edendo*.

116 Only the *Ordo Bambergensis* makes this point, on which see Litewski, *Zivilprozeß*, 279 and n. 186.

117 On *res litigiosa*, Berger, *Encyclopedic Dictionary*, 678, citing Cod. 8.36, also Radding, *Corpus Iuris*, 93, noting this passage from the *Codex* was already cited in the Lombard Law (Roth 232). For the classical law, Kaser, *Zivilprozeßrecht*, 298

118 This is incorrect. There is no c. 9 in that *quaestio*. Compare again C 11 q. 1 c. 50.

119 Compare C 16 q. 4 c. 2.

120 While the classical *colonus* could be a sublessee, Berger, *Encyclopedic Dictionary*, 739, the text probably refers to the semi-free laborer of Late Antiquity. That they were ‘semi-free tied tenants’ in contemporary Lucca, Wickham, *Courts and Conflict*, 88.

same state it was when the trial was moved, namely with the *colonus*. Its fruits ought to be sequestered until the case is heard, as in C 2 q. 6 c. 26. From the aforementioned chapter (C 11 q. 1 c. 50), one can gather that a bishop should not grant another (cleric) a benefice that is under pending litigation. If anyone also sought from the supreme pontiff the confirmation of a property in a pending dispute,¹²¹ this shall be void, as in *Extrav. In litteris*.¹²² In civil law, anyone who knowingly accepts a property in a pending dispute because of a gift, a sale, or some sort of contract, is compelled not only to restore the property but also is deprived of its price, not that he who alienated it may lose its profits but rather that an equivalent sum might legally be obtained by the treasury. If he acquired it ignorantly by some title, then he ought not to be fined but, since he was he deceived, ought to benefit. With the alienation voided, he shall receive an equivalent price. Indeed, it is right that the seller on account of his own fraud be under the penalty of a 'litigious contract' and pay the third part of the price, since he did not declare the property to the buyer.¹²³ Otherwise, property alienated in a pending dispute stands because of a dowry, the nuptial gifts, but both the agreement¹²⁴ and division of the object among co-heirs succeeding to its possessor, as in Cod. 8.36.4,¹²⁵ nor does one view such a division as alienation, as in Nov. 112. cap. 1.¹²⁶

Concerning Proctors¹²⁷ (Cap. VI)

Since in their own cases men are either unwilling or unable to preside, it was handed down that they could administer, sue, or be sued by others,

¹²¹ Litewski, *Zivilprozeß*, 82 and n. 57, referring also to cap. xxi below, and also to *Practica legum*, cap. 18, 21.

¹²² Pope Alexander III (JL 13921). The incipit is not in Comp. 1, but, instead, comes from a decretal sent to the Bishop of Exeter received at x 2.30.1. Compare also the *Collectio Francofurtana* 55.4.

¹²³ Cod. 8.36.5pr.

¹²⁴ On *transactio*, compare the *De edendo* in chapter 3.

¹²⁵ This text is apparently lost, on which see Blume's annotated *Codex*, accessed at http://www.uwyo.edu/lawlib/blume-justinian/_files/docs/book-8pdf/book8-36.pdf on 4 April 2014.

¹²⁶ On the *res litigiosa*, Kaser, *Zivilprozeßrecht*, 588 n. 19. Nörr, *Prozessrecht*, 27–28, treats civil and canon law.

¹²⁷ See chapter 3 for the *De edendo*, with reference to Bassianus. Landau, "Die Erteilung des Anwaltmandats," 564–65, discusses Bulgarus, Bassianus, Placentinus and the *cautio de rato*; Litewski, *Zivilprozeß*, 170, with reference to Bulgarus, and 174–75, as well as 156, for the *De edendo*, *Practica legum*, cap. 27, and *Olim edebatur actio* §512.

as in C 5 q. 3 c. 3.¹²⁸ There one understands the office of the proctor as being through the advocate,¹²⁹ who conducts both the offices of advocate and proctor. The proctor undertakes the management of another's affairs at the command of either the owner or principal in the case.¹³⁰ The case can be civil or criminal.¹³¹ Sometimes bishops and priests sue; at other times, clerics or laymen. If the case is a criminal one, no one save himself can sue or defend. An exception is the crime where only the injured party could sue,¹³² where an 'Illustrious Person' is able to sue in court or raise an exception, as in C 3 q. 9 d.p.c. 18.¹³³ In a civil case, each is permitted by common law to sue or defend a case through a proctor.¹³⁴ However, bishops and priests are not only allowed but also commanded to do so, as in C 5 q. 3 c. 3.

These are the necessary (qualifications) for a proctor:¹³⁵ (he must be) a free man, the head of the family,¹³⁶ possessing reason, of sound mind, the owner of the property or the principal of the case. When, however, an association is sued,¹³⁷ let either one or two from it be appointed to litigate or defend, and the rest of the group admitted to testimony, as in the *Extrav.*¹³⁸

It must be noted that a bishop should have three persons appointed to administer secular duties: the *vicedominus*, *oeconomus*,¹³⁹ and the

-
- 128 See also Dig. 3.3.1pr. and Klinck, "Zur Bedeutung des Wortes Procurator," 29–30. Compare also the treatment of C 5 q. 3 c. 3 by the contemporary decretist treatise, *In prima parte agitur*, on which see Brundage, *Medieval Origins*, 176 n. 33.
- 129 *Procuratio*, on which see Berger, *Encyclopedic Dictionary*, 683.
- 130 On various forms of *dominus*, Berger, *Roman Law*, 442. On this passage, Gaines Post, "Parisian Masters as a Corporation: 1200–1246," *Speculum* 9.4 (1934): 430 and n. 7, rp. in his *Studies in Medieval Legal Thought*, 40 n. 84. See also Benson, *Bishop Elect*, 84 n. 19 and Litewski, *Zivilprozeß*, 162 and n. 103.
- 131 Litewski, *Zivilprozeß*, 163.
- 132 On *crimen iniuriarum*, Dig. 3.3.42.1. See Robinson, *The Criminal Law*, 4–5, 49 and Nicholas, *An Introduction to Roman Law*, 215–22. For contemporary England, Richardson and Sayles, *Law and Legislation*, 82–83, arguing the *actio iniuriarum*, action of trespass, while not noted by Glanvill, played an important role in the early common law.
- 133 See chapter 2 above for Bulgarus on the *illustres* and also Cod. 9.35.11.
- 134 Post, "Parisian Masters," *Studies in Medieval Legal Thought*, 40 n. 84.
- 135 This list anticipates Tancred, on which see Litewski, *Zivilprozeß*, 163 and nn. 114–116.
- 136 Litewski, *Zivilprozeß*, 159 n. 41.
- 137 On the *collegium*, Berger, *Encyclopedic Dictionary*, 395.
- 138 Eugenius III (JL 9067, x 2.20.6).
- 139 See Nörr, *Prozessrecht*, 33, Litewski, *Zivilprozeß*, 159, comparing also *Olim edebatur actio* §490 and Helmholz, *The Canon Law*, 87, noting the *oeconomus* would eventually become the churchwarden in the English church.

advocate. The *vicedominus* takes care of the revenues of the bishop and provides for strangers,¹⁴⁰ as in D 89 c. 2 and 3. The advocate litigates the cases for the bishop, save for public crime, as in C 5 q. 3 c. 3.¹⁴¹ The *oeconomus* dispenses the property of the church, namely of the clergy, for it is the *oeconomus* to whom the maintenance of this properties is mandated, as in C 16 q. 7 c. 21¹⁴² and D 89 c. 4.¹⁴³

It also must also be noted that, indeed, it is simony to sell those administrations, since they have some spirituality attached to them. In some churches, benefices are canonically conferred on persons because of the duties they perform. These benefices cannot be taken away from them unless they commit some offense. C 1 q. 1 c. 8 speaks about this case. However, it is otherwise when they have no office attached. We see that leaders of cities and vills sell the office of a proctor,¹⁴⁴ and yet believe they do not sin. Nevertheless, some say imprecisely that to sell or purchase administration of this sort is simony, as in C 1 c. ult.¹⁴⁵ These offices

140 *Vicedominus* is uncommon in the *ordines*. See Litewski, *Zivilprozeß*, 159 n. 53.

141 Note here a decision by Archbishop Hugh of Rouen in 1146. Delegated by Pope Eugenius III to hear a dispute between Bishop Phillip of Bayeux and the Abbey of Troarn, he decided for the bishop and also confirmed the *iura episcopalia*, including 'de publicis criminibus hominibus eorum penitencias dare.' See Müller, *Päpstliche Delegationsgerichtbarkeit*, 2.88. On varying designations of *crimen*, including *crimina publica*, in twelfth-century civilian and canonistic thought Giovanni Minnucci, "Diritto e processo penale nella prima trattatistica del xii secolo: qualche riflessione," in *Ins Wasser geworfen*, 603–04.

142 Landau, "Das *Dominum* der Laien," 500–02, 504.

143 On the *oeconomus* in twelfth-century canon law, Benson, *The Bishop Elect*, 75, treating Rufinus' discussion of the bishop-elect's ability to administrate but not govern. Governance only came after his consecration. The relevant canon in Gratian is D 89 c. 4. Compare the *Summa Stephani* here: Volumus. Nota quoniam episcopus tria debuit ad res temporalis administrandas tribus personis collata habere officia: advocatum, ut infra C 5 q. 3 c. ult, vicedominum, et oeconomum, ut hic et in sequente capitulo. Advocatum dicimus qui causam episcopi tractat, excepto publico crimine; vicedominum, qui redditus episcopi disponit et eius domui circa peregrinos providet; oeconomum, qui res ecclesiae, scilicet clericorum dispensat. Nam oeconomus est, cui res ecclesiastica gubernanda mandatur. The *Summa Lipsiensis* is even closer to our treatise: Volumus. Vel rubricus huius capituli non consonabit capitulo, uel dices maiorem domus esse yconomum. Nota quod episcopus tria habet officia, que tribus personis debent conferri, Ad res temporalis administrandas debet enim habere advocatum, uicedominum, yconomum: aduocatum, qui causas episcopi possit tractare excepto public crimine, ut infra v. q. iii. Quia; uicdominum, qui eius redditus disponat et domui circa peregrinos prouideat; yconomum, qui res ecclesie et clericorum dispenset; nam et yconomus est, cui res gubernande mandantur.

144 Berger, *Encyclopedic Dictionary*, 653.

145 C 1 q. 3 c. 8. The *Summa Simonis* is close to the *Ordo Bambergensis* when commenting on this canon: *Si quis episcopus usque promouerit dispensatorem aut defensorem*. Et nota

indeed are connected to spiritualties, which can only be fulfilled by clerics, as in C 16 q. 7 c. 22¹⁴⁶ and C 1 q. 3 c. 8. A minor is neither made a proctor nor can he appoint one without authority (given) from his own defender,¹⁴⁷ as in *Con. Lat. III* c. 16, which states that no one may receive a deanery, archdeaconry and other ministries having care of souls unless he has attained the age of 25.¹⁴⁸ Let the case to be litigated be delegated to the proctor, provided the suit is honest and legally appropriate, since the delegation of a base matter is invalid, as in D 50 c. 27, C 11 q. 3 c. 92 and following. A civil, pecuniary case is not lawfully delegated, as we say

quod administrationes istas uendere tunc demum est simoniacum cum spirituale aliquod habent sibi adnexum. In quibusdam enim ecclesiis personis istis, propter ea que exercent officia, beneficia canonice conferuntur que eis non possunt subtrahi nisi eorum promerente delicto. In quo casu loquitur presens auctoritas. Cum uero nullum sibi habent spirituale adnexum, secus est; nam et principes uidemus procuracionem urbium et uillarum uendere quos tamen ob hoc peccare non credimus. Indistincte quidam dicunt eos simoniacos, qui talia uendunt. Hec autem officia annexa sunt spiritualibus quia nisi a clericis exponi possunt, ut infra C. xvi q. ult. In nona (C 16 q. 7 c. 22), et C.e. q.iii Salvator (C 1 q. 3 c. 8). The fact that the following two canons cited by the *Ordo Bambergensis* are also cited here by the *Summa Simonis* suggests some dependence. Compare also the *Summa Lipsiensis*, C 1 q. 3 c. 8 s.v. yconomum: . . . Nota quod castalidia secundum quosdam si a laico emetur non est simonia; secus si a clerico. Nam si laicus pecuniam accipiat, ut hostia claudat vel campanas pulset, non est simoniacus, cum liceat sibi operas suas locare; si vero hostiarius pro hoc officio habendo daret, esset simoniacus. Set in quibusdam ecclesiis prebenda est statuta, que debetur tali persone. Tunc quicumque emet simoniacam committet. Quidam tamen dicunt in nullo casu castaldiam posse vendi. See also Herde, *Päpstliche Delegationsgerichtsbarkeit*, 35–36.

146 On this canon, Landau, "Das *Dominum* der Laien," 500–502.

147 On the *defensor*, who defended someone in court whether he had the person's permission or not, see Berger, *Encyclopedic Dictionary*, 428, on the tutor of a minor who wished to be a plaintiff. Compare also Pope Gregory the Great's appointing of a defensor discussed in his letter to Maximus of Salerno (JE 1874), on which see Landau, "Die Erteilung," 569, 548. On the exclusion of the minor in our *ordo*, Litewski, *Zivilprozeß*, 164 n. 130, a point not treated by the other *ordines* in this study.

148 The pertinent section of canon 16: Inferiora etiam ministeria utputa decanatus archidiaconatus et alia quae animarum curam habent annexam nullus omnino suscipiat sed nec parochialium ecclesiarum regimen nisi qui iam vigesimum quintum aetatis annum attigerit et qui scientia et moribus existat commendandus. Compare Duggan, <http://faculty.cua.edu/pennington/Canon%20Law/DugganACouncils.htm> accessed on 29 May 2012. *Cum in cunctis* (c. 16) gave conciliar support to the principle of majority rule in ecclesiastical communities, so that decisions made by the *maior et sanior pars* (the greater and more sound party) should not be obstructed by factions or bad local custom. This is a good example of a source being extended to a different argument by the *Ordo*. On archdeacons' abuse of their position, generally, Cheney, *From Becket to Langton*, 152–53.

above in C 3 q. 8.¹⁴⁹ The proctor ought to fulfill the mandate just as it was enjoined to him.¹⁵⁰ He ought neither to exceed the limits of the mandate nor do less than what they require, as in C 25 q. 2 c. 6.¹⁵¹ and C 2 q. 7 c. 16.¹⁵² If he was mandated to sell the estate, he ought not sell the horse.¹⁵³

However, now and then someone exceeds the laws of the mandate or does not fulfill them. For example, if it were necessary for the one to whom the case was delegated to exceed the mandate, he ought to appeal and state his reason for doing so, as in the *Extrav.*¹⁵⁴ since he is exceeding what was mandated him. Concerning these things known to pertain to his proctorship, the proctor receives full power.¹⁵⁵ He fails to fulfill the

-
- 149 C 3 q. 8 cc. 1–2. The specifics of the argument, a civil case involving money, are not discussed. Instead, the texts from Gratian treat the proper judicial order concerning an accused bishop. Thus, it is canon, not civil, law that is established by way of contrast. On Gratian's distinguishing between a civil and criminal case, Melody Eichbauer, "St. Gall Stiftsbibliothek 673 and the Early Redactions of Gratian's *Decretum*," *BMCL NS.* 27 (2007): 105–39, discussing Causa 14.
- 150 On the mandate, *Zivilprozeß*, 165–66 and n. 152, comparing also *De edendo*, in general, *Practica legum*, cap. 27, and *Olim edebatur actio* §248, among several paragraphs. See also Legendre, "Du droit privé," 24 on the *Summa Lipsiensis*' treatment of mandate and the role of the proctor, which he judges the most "refined" of the canonistic discussions, and also 30 and n. 1 on the *Ordo Bambergensis* here. Again, there seems some connection between the *Ordo* and this *Summa*.
- 151 On this maxim, Vincenzo Arangio-Ruiz, *Il mandato in diritto romano* (Naples: E. Jovene, 1965), 168–88, cited by Elizabeth A.R. Brown, "Representation and Agency Law in the Later Middle Ages. The Theoretical Foundations and the Evolution of Practice in the Thirteenth- and Fourteenth-Century Midi," *Viator* 3 (1972): 333–34 and n. 13.
- 152 This is one of a block of canons in Gratian that went back to Pseudo-Isidore, on which see Landau, "Die Anklagemöglichkeit Unterordneter," 586–87. The connection with Gratian's canon here is particularly obscure.
- 153 This illustration may be unique to the *Ordo Bambergensis*.
- 154 Alexander III to the bishop of Norwich, (JL 14027, x 1.29.7). Compare also the *Collectio Francofurtana*, 38.14. On the papal mandate, Nörr, "Päpstliche Dekretalen und römisch-kanonischer Zivilprozeß," 53–54.
- 155 Cod. 2.12.10. On *plenaria potestas*, among many studies, Kaser, *Zivilprozeßrecht*, 385 and n. 19. Gaines Post, "Roman Law and Early Representation in Italy and Spain, 1150–1250," *Speculum* 18.2 (1943): 215–16 and n. 8 also his essay "Plena Potestas and Consent in Medieval Assemblies," *Traditio* 1 (1943): 356–64, rp. in his *Studies*, 92–102, and Benson, *Bishop Elect*, 59 and, especially, 83 and n. 16. See also Snow, "Evolution of Proctorial Representation," 329, noting the development of corporate proctors during the second half of the twelfth century, a topic of interest to both Vacarius and Azo. On Rufinus' consideration of *plena potestas* and *ius* illustrating how a decretist was 'adapting the language of Roman law' but 'not just using it unthinkingly,' Brian Tierney, "Ius and Metonymy in Rufinus," in *Studia*

mandate when, for example, he was mandated to sell the estate for 100 and sold it for 50.¹⁵⁶ Indeed, it is understood that he was tacitly ordered to sell it for a lesser price if he could, as in C 22 q. 2 c. 14, where it is said 'if anyone takes the sword from a thief, and, by chance, the thief then claims it, it ought not be returned lest he kill himself or another.'¹⁵⁷ Indeed, what was mandated is tacitly understood not to be restored to the thief, as in Cod. 2.13.12.¹⁵⁸

The proctor of the defendant,¹⁵⁹ even when it happens that the mandate ceases, ought to be admitted to defend; nevertheless he ought to provide surety about paying the judgment. The proctor of the plaintiff ought to give surety concerning defending if it stands that he has the mandate. The penalty for the proctor who does not defend is that he is denied the suit.¹⁶⁰ When it happens that the mandate ceases, he is rejected who desires to claim a right, even if fully prepared to give surety,¹⁶¹ unless he be related by blood or affinity to the plaintiff. Even if the mandate ceases, this one is admitted, as long as it is not clear that he is claiming against the mandate. Let him then give surety *de rato et defendendo*.¹⁶² Where

in honorem, 555–56. Professor Tierney's comments can be applied, I believe, also to our treatise's use and adaptation of the civil law.

- 156 This considers *laesio enormis*, on which see Berger, *Encyclopedic Dictionary*, 536 and, in general, Herbert Kalb, *Laesio enormis im Gelehrten Recht* (Vienna: Verband der Wissenschaften, 1992), 39, noting Gratian's silence on the subject; only with the decretists did consideration of *laesio enormis* begin. He does not discuss the *ordines*. See also Wallinga, "The *Casus Codicis* of Wilhelmus de Cabriano and the *Dissensiones Dominorum*," though without considering the *ordines*. It should be noted, however, that *laesio enormis* had concerned the Church long before the late twelfth century. For reference to this by Augustine in one of his letters, see Lenski, "Audientia episcopalis," 86.
- 157 C 22 q. 2 c. 14. See also above. On *tacite* in medieval discussions of good faith, Simon Whittaker, *Good Faith in European Contract Law*, 111 n. 94, referring to Dig. 18.1.72. On *plena fides* and *adminicula*, Nörr, *Prozessrecht*, 155.
- 158 For the classical law, Kaser, *Zivilprozeßrecht*, 213 n. 37. For medieval law, Oratio Condorelli, "L'usario, il testamento, e l'Aldilà: Tre *quaestiones* di Marsilio Mantighelli in tema de usuria," in *Medieval Church Law and the Origins of the Western Legal Tradition*, 226.
- 159 Post, "Parisian Masters," 51 n. 134.
- 160 Dig. 3.3.43.4. The proctor's duty to defend is found not only here but also in *De edendo* and *Olim edebatur actio* §249, among many sections, on which see Litewski, *Zivilprozeß*, 172 and n. 253.
- 161 Compare Dig. 3.3.40.4.
- 162 Berger, *Encyclopedic Dictionary*, 384. This surety was given by the proctor so that the principal he represented would approve of what he did and not sue a second time. For the classical civil law, Buckland, *Manual of Roman Private Law*, 408. See also Litewski,

there is doubt concerning the mandate, the proctor is rejected unless he either proves the mandate or gives surety that the principal would consider it correct, or the defendant judges that he does not wish to compel the proctor to provide surety or prove the mandate.¹⁶³ However, if he does give the surety *de rato*, and his adversary proves that he did not have the mandate, the dispute is declared void. No one is compelled against his will to undertake the proctorship.¹⁶⁴ He is (considered) unwilling, not only who contradicts the mandate but also who is not proved to have consented. If he who undertook the mandate does not give surety for defense, he is compelled to defend, even though rejected as a proctor.¹⁶⁵ If he gives surety for defense, he must always defend, unless removed by just cause, or with the case heard, he recused himself from suing or, in the course of time, the property would be ruined with the owner not absent. Otherwise, he is forced to join issue.

The mandatory's revocation ends the delegated proctorship. It ceases with the timely revocation by the mandator, however, with the matter unchanged, that is, not yet contested.¹⁶⁶ After it is contested, it is not legally dissolved, as in the *Extrav.* of Lucius III to the Archbishop of Gran.¹⁶⁷ The proctor's execution is this:¹⁶⁸ if anyone contracted from the mandate, the modified action (*actio utilis*) is acquired by the principal,¹⁶⁹ and it prejudices the original suit from the mandate (*actio directa*)¹⁷⁰

Zivilprozeß, 170 and n. 222, comparing *Olim edebatur actio* §255 and the *De edendo*, 174 and n. 293 and 175 n. 297.

163 Post, "Parisian Masters," 51 n. 134 discussing this in the *ordines*.

164 See above, Cod. 2.12.10, also Litewski, *Zivilprozeß*, 161 n. 87, comparing also *Olim edebatur actio* §261, among various paragraphs.

165 A phrase follows, *Poena enim procuratoris reddere etc.* Von Schulte remarks that this passage is illegible due to its abbreviations.

166 On *revocatio*, Nörr, *Prozessrecht*, 31. Referring to our treatise and how proctorship was ended, Litewski, *Zivilprozeß*, 173, comparing various sections of *Olim edebatur actio*, for example §267–273.

167 (JL 15196, x 3.30.20). Compare also the *Collectio Francofurtana*, 38.17. (x 1.29.19).

168 See Litewski, *Zivilprozeß*, 171.

169 For *actio utilis*, Berger, *Encyclopedic Dictionary*, 345–46, distinguished from *actio directa*, on which see below.

170 On the *actio directa*, 'in the case of a deposit or a mandate,' Berger, *Encyclopedic Dictionary*, 347, also Nicholas, *Introduction to Roman Law*, 200–01, and Schlinker, *Litis contestatio*, 77, along with Litewski, *Zivilprozeß*, 207 and n. 267, on the *Ordo Bambergensis*. The *Summa Elnonensis* also treated *actio directa*, on which see Franssen, "Colligite Fragmenta," 104–05, also Wickham, *Courts and Conflict*, 126 for a 1174 example of an *actio in rem directa* issued by cathedral canons claiming land.

judged to the proctor unless he is proctor on his own behalf.¹⁷¹ The proctor is also condemned, unless he was made proctor in his own affair; otherwise, if the proctor won or lost his suit, the principal alone is effectively sued. Again, if anyone provides two proctors at different times, it seems that the second obviated the first.¹⁷² With several proctors given and all similarly bound in equal liability,¹⁷³ the holder's condition is better.¹⁷⁴ Note again that the proctor is able to be constituted for a fixed term, under condition, in perpetuity, through a messenger, and by letter.¹⁷⁵

Concerning the Excuse of an Absent Party¹⁷⁶ (Cap. vii)

Many exceptions can excuse an absence,¹⁷⁷ for example due to involvement in a major case, as in C 22 q. 2 c. 5, being detained by poor health, as D 18 c. 1,¹⁷⁸ impeded by a family funeral, as C 13 q. 2 c. 28, detained by a magistrate by no fault of one's own, as D 18 c. 13,¹⁷⁹ having to be rescued from violence and chains, as D 50 c. 32,¹⁸⁰ or prevented by storm or flood, for example when a bridge is destroyed.¹⁸¹

171 On *procurator in rem suam*, Berger, *Encyclopedic Dictionary*, 655, Klinck, "Zur Bedeutung des Wortes Procurator," 50–51, Kaser, *Zivilprozeßrecht*, 214, and, for the twelfth century, Litewski, *Zivilprozeß*, 168 and n. 192, comparing *Olim edebatur actio*, §264, among several paragraphs. On *cessio iuris* and the proctor, Giraud Amalric, *Business Contracts of Medieval Provence: Selected Notulae from the Cartulary of Giraud Amalric of Marseilles*, 1248, ed. John Pryor (Toronto: University of Toronto Press, 1981), 105–06, also Brown, "Representation and Agency Law," 336 and n. 17 treating Accursius' later civil-law commentary.

172 Dig. 3.3.31.2.

173 On *in solidum*, Berger, *Encyclopedic Dictionary*, 710.

174 Dig. 9.4.14pr. and Dig. 3.3.32. On *simile occupantis erit conditio melior*, Berger, *Encyclopedic Dictionary*, 606, Kaser, *Zivilprozeßrecht*, 385–86, also Litewski, *Zivilprozeß*, 163.

175 Post, "Parisian Masters," 43 n. 93, with reference to Bernard of Pavia but not the *Ordo Bambergensis*.

176 Litewski, *Zivilprozeß*, 277, comparing also Bulgarus and the *De edendo*.

177 Such concern for exceptions is shared with *Olim edebatur actio*, on which see Fowler-Magerl, *Ordo*, 8.

178 This citation does not seem to fit the argument well.

179 Gratian's text concerns the consecration of the pope.

180 There is no clear connection, apart from the canon's reference to the persecution of Christians.

181 Dig. 2.11.2. On these divisions, also in the *De edendo*, *Olim edebatur actio* §629–634, and even earlier in Irnerius, Litewski, *Zivilprozeß*, 278–79 and n. 49.

Concerning Advocates (Cap. VIII)

Advocates are all in some way occupied in litigating suits. Yet these are not only 'called' (to court) but also clad in the toga; (they are) patrons and soldiers of lawsuits,¹⁸² a militia fighting with letters. For patrons of suits fight like soldiers, etc.¹⁸³ Advocates ought to plead what the suit requires and to refrain from injuring their client's case.¹⁸⁴ Let them not by their own efforts prolong matters nor consider it a slight to their honor if they do not have the right to sit in court and, instead, have to stand.¹⁸⁵ They ought not to collude with the other party,¹⁸⁶ nor should they demand an excessive fee,¹⁸⁷ that is, one exceeding 100 aurea.¹⁸⁸ Let advocates also beware that they not collude for,¹⁸⁹ if the crime is proven, let them receive an extraordinary punishment,¹⁹⁰ and if the reason for this is sought possibly after the sentence and the payment of the fine (in the original case), one should follow the procedure concerning false and corrupt documents.¹⁹¹

Some are completely rejected from advocating or pleading one's own claim or another's; others are permitted only to plead for themselves;¹⁹²

-
- 182 Placentinus, *Summa Codicis*, 2.7, on which see Hermann Fitting, *Das Castrense Peculium in seiner Geschichtlichen Entwicklung und Heutigen Gemeinrechtlichen Geltung* (Halle: Buchhandlung des Waisenhauses, 1871), 543. Compare the *De edendo* and *Olim edebatur actio* §329 noted by Litewski, *Zivilprozeß*, 177 n. 14.
 - 183 Pennington, "Roman Law at the Papal Curia," 235 and n. 9 on this. The text is Cod. 2.7.14. See also Brundage, *Medieval Origins*, 605.
 - 184 Compare Cod. 2.6.6 On this section of the *Ordo* discussing the lawyer's ethics, Litewski, *Zivilprozeß*, 181, and n. 85, comparing Bulgarus, the *De edendo*, *Olim edebatur actio* §329.
 - 185 Cohen, *History of the English Bar*, 96 n. x, citing Richardus Anglicus, as well as the *Ordo Bambergensis* which, on the authority of Bethmann-Hollweg and von Schulte, he located at Oxford ca. 1180.
 - 186 On *pacisci de crimine*, Berger, *Encyclopedic Dictionary*, 614. See also James Brundage, "Doctoribus bona dona. Suits to Recover Unpaid Legal Fees," in *The Creation of the Ius Commune*, 280 n. 19.
 - 187 On the *honorarium* here, comparing *Olim edebatur actio* §330, 335, Litewski, *Zivilprozeß*, 183 and n. 126.
 - 188 Compare Dig. 2.14.53. The maximum fee in the classical law was 100 aurea, on which see Dig. 50.13.1.12 and Brundage, *Medieval Origins*, 200 and n. 16.
 - 189 On *praevaricatio*, Berger, *Encyclopedic Dictionary*, 648, also the *De edendo* in chapter 3.
 - 190 Compare Cod. 2.7.1.
 - 191 Dig. 44.1.11. On the penalty in the classical Roman law for using forged documents in court, Robinson, *Criminal Law*, 38 and nn. 204–205.
 - 192 It seems that *postulare*, not *postulari* is better.

still others both for themselves and certain other persons.¹⁹³ The deaf and minors younger than seventeen are completely barred.¹⁹⁴ The praetor stated that at seventeen he was old enough to take part in public affairs. It is related that when he was that age or a little older Nerva Silvius responded concerning the law.¹⁹⁵ Nevertheless both the blind and pimps are permitted to testify for themselves in person;¹⁹⁶ also those who gained at one time the worst possible reputation at another plead for themselves and certain others.¹⁹⁷ These are made infamous by vile cause.¹⁹⁸ You shall find all these things in C 3 q. 7 c. 2.¹⁹⁹

One must know that in a civil case clerics are not allowed to plead before a secular judge unless they are pursuing their own affairs, a case for their own church, or on behalf of 'wretched persons' unable to manage their own affairs.²⁰⁰ I call those (persons) clerics who are subdeacons and above, or those in minor orders, if they are maintained by ecclesiastical stipends, as (stated) in the Lateran Council.²⁰¹ Priests are especially prohibited, as in C 14 q. 5 c. 10.²⁰² In a civil case, any cleric is able to defend before an ecclesiastical judge, as in C 15 q. 2 c. 1. However, in a criminal case, they are able to plead before a civil judge on behalf of the defendant but not for the plaintiff, as C 14 q. 6 c. 1²⁰³ and C 23 q. 5 c. 7²⁰⁴ and

193 Dig. 3.1.1.1.

194 On excluding minors and the deaf, Litewski, *Zivilprozeß*, 157 and nn. 132, 137, comparing also *Olim edebatur actio* §336.

195 Dig. 3.1. On this text, Pennington, <http://faculty.cua.edu/pennington/BigBangRomanLaw.htm> accessed on 16 February 2013. On the two Nervas, father and son, early members of the Proculian School of jurisprudence, Jolowicz, *Historical Introduction*, 384–85.

196 Compare Dig. 3.1.1.5. Thus, while a blind person could not testify for others, he could still be a magistrate. On this point in our treatise, Litewski, *Zivilprozeß*, 154 and n. 140, a point not made by our other *ordines*. On the pimp, whether professional or amateur, Jane F. Gardner, *Being a Roman Citizen* (New York: Routledge, 1993), 149 and Brundage, *Law, Sex, and Christian Society*, 46; for medieval restrictions on them, 310, 392.

197 Berger, *Encyclopedic Dictionary*, 746–47. Turpitude conferred *de facto* infamy.

198 Litewski, *Zivilprozeß*, 154 and n. 144, comparing also *Olim edebatur actio* §337, 338.

199 See Duggan, "Roman, canon and common law," 381 and n. 20.

200 On the *miserabiles personae*, which included women, Helmholz, *The Spirit*, 121–23 for the civil law and 128–32 for canon law; for the *Ordo Bambergensis*, Litewski, *Zivilprozeß*, 154 n. 143. On III Lateran can. 12, which permitted clerics to plead for these and others in distress, Roumy, "L'avocat commis d'office," 381–82.

201 III Lateran, can. 12.

202 On the treatise here, Litewski, *Zivilprozeß*, 179.

203 The canon treats the alienation of property, the failure to restore it, and penance.

204 C 13 in von Schulte's edition. On this canon, Helmholz, *The Ius Commune*, 56, 65.

C 23 q. 5 cc. 1–3. We believe, however, they are able to be advocates on his behalf before the ecclesiastical judge. However, if in speaking on behalf of those whose cases are being litigated the advocates erred by denying the claim,²⁰⁵ then they are impaired as if they themselves, plaintiff or defendant, were speaking. Nevertheless, they are able to correct their error of fact up to the sentence, as in D 33 c. 6,²⁰⁶ but not error of law.²⁰⁷ They can correct the error of the advocate within three days, if he erred and the principal did not understand, perhaps because he was illiterate,²⁰⁸ as in C 35 q. 9 d.p.c. 2, C 34 q. 1 and 2 c. 6. In turn, if the advocates shall not have spoken about law or fact, the judge ought to supply and assign an excused absence to the absent party,²⁰⁹ which the judge must also supply on behalf of the deceased, if he is accused. The judge ought to make allegations and supply their parts,²¹⁰ since God's presence fills their absence,²¹¹ as C 2 q. 7 c. 18.²¹² If the defendant or the advocate was

205 *Infitiando*, erring by denying the claim, Berger, *Encyclopedic Dictionary*, 501, also Litewski, *Zivilprozeß*, 364 n. 146 and 473 n. 58 on our treatise and other *ordines*.

206 Again, this is an unexpected text for the *Ordo*'s argument. The canon, which should also be read along with Gratian's following *dictum*, treats whether men who were married when baptized could subsequently enter the clergy. They could, provided, as Gratian notes, this had taken place prior to taking sacred orders. The point of transition, the taking of holy orders which prohibited marriage, is extended to the difference between error of fact and error of law, the latter, like becoming a priest, the more serious condition.

207 On the difference between error of fact and error of law (connected to *ignorantia iuris*), Berger, *Encyclopedic Dictionary*, 456 and, for treatment by contemporary civilian glossators, Otte, "Logische Einteilungstechniken," 163. See also Nörr, *Prozessrecht*, 179 and Hallebeek, "Developments in mediaeval Roman law," 67–68 concerning of *condictio indebiti*, where someone attempts to recover money mistakenly paid. On the distinction between *error iuris* and *error facti* in the *Ordo*, Litewski, *Zivilprozeß*, 103. This is not found in the other *ordines* in this study.

208 Litewski, *Zivilprozeß*, 182 n. 104. The edition gives *errorem facti* in the text. Perhaps this might be an intruded gloss.

209 Kuttner and Rathbone, "Anglo-Norman Canonists," 290 and Nörr, *Zur Stellung*, 48 and n. 55, noting also dependence on Placentinus' *Summa Codicis*.

210 *Dissensiones Dominorum*, 241: Dicit Placentinus quod, si sdvocati minus dixerint, iudex debet supplere, tam de iure, quam de facto. Nam, contracto heremoditio, iudex dasset pro absente allegare, et ius partem supplere, ut C. de appellatio. L. ult (Cod. 7.62.39) et C. de temporibus et repa. A L. 11 §ult. (Cod. 7.63.2.2). See also Nörr, *Zur Stellung*, 48, 83.

211 Cod. 3.1.13.4.

212 Once again, the text from Gratian does not seem to fit the argument well. The canon treats the exclusion of those able to accuse unless they are trustworthy, etc.

unskilled in the law²¹³ and did not know the case and omitted the allegation, then the judge ought to supply what was missing.

Concerning the Calumny Oath²¹⁴ (Cap. ix)

Concerning the calumny oath it is asked whether in some cases it must be taken by clerics. Concerning this point, various canonical constitutions have arisen. Indeed, Pope Honorius declares in an *Extrav.*:²¹⁵

We decreed and defined with unbreakable apostolic authority, that neither a bishop, a priest, a cleric of any order, nor an abbot or some monk or religious woman be compelled to submit for any reason an oath in any controversy whatsoever, whether civil or criminal, but may, instead, be allowed to delegate the duty to other suitable persons, if he knows that it benefits his church.

However, Eugenius III, to Arduin, subdeacon of the Roman Church and Master Omnibono, writes:²¹⁶

We received your gracious letter in which you asked whether in the case you are trying between our venerable brother G. of Bologna and our beloved son Abbot Aldric of Pavia it is appropriate to offer the calumny oath. Clearly, in these cases where the suit only concerns churches, tithes, and spiritualities, it is the custom of the Roman church neither to give nor to receive the oath concerning calumny. For

213 On the *advocatus imperitus*, Litewski, *Zivilprozeß*, 176 n. 7, citing incorrectly the chapter in our treatise.

214 On the calumny oath in the late twelfth century, Sayers, *Papal Judges Delegate*, 86–87, also Helmholz, *The Spirit*, 153–54. The decretals cited in this section of the treatise are also treated by Brundage, “The Lawyer as His Client’s Judge,” 595–96.

215 On this decretal (Pope Honorius II, JL 7401, X 2.7.1) see chapter two. Among various decretal collections transmitting this letter, compare the *Collectio Francofurtana*, 34.1. See also Helmholz, *The Spirit*, 153–54, and Duggan, “De consultationibus,” 209 and n. 113, citing also Landau, “Rechtsfortbildung,” 120–27, who considers Honorius’ decretal one of the few twelfth-century examples of papal legislation by general letter. On Huguccio’s use of this decretal as respect for the ‘perfect autonomy of the temporal order,’ Müller, *Huguccio*, 127–28 and n. 32.

216 Pope Eugenius III (JL 6684, X 2.7.2.) On Aldricus, Kuttner and Rathbone, “Anglo-Norman canonists,” 301 n. 32, Fried, *Über die Entstehung*, 187–88, and Nörr, *Prozessrecht*, 14 and n. 46.

such cases are appropriately settled not by the severity of the laws but from the equity of the canons, and the canons do not assign the calumny oath to cases of this sort. Thus, having dismissed (any) contention about offering the oath of calumny, let Your Discretion proceed to further matters.

Therefore, the constitution of these canons speaks about clerics, because in spiritual cases an ecclesiastical person is not compelled to give calumny oaths; Eugenius speaks similarly in the *Extrav.*, but in pecuniary or criminal cases the oath is offered through the *oeconomus* or defenders,²¹⁷ to whom this duty can be delegated. These shall also vow in the spirit of the principal, on which the canon *Inhaerentes* speaks.²¹⁸ Nevertheless, Pope Lucius III decreed in many rescripts that this oath may be offered.²¹⁹

Concerning Sureties²²⁰ (Cap. x)

The plaintiff suing on his own behalf is ordered to provide a suretor who should remain until the end of the trial, as in C 23 q. 5 c. 19. If he shall have been found to have made an unjust claim, let him restore all damages pertaining to the defendant, as in C 3 q. 3 d.p.c. 4²²¹ and §4, and the tenth part of the amount by means of a bill,²²² as in *Authenticum Generaliter C. de episcopis et clericis*.²²³ However, the defendant sued in his own name is ordered to give fiduciary surety that he shall appear in court, as in C 3 q. 3 c. 19 or, instead, offer the surety oath,²²⁴ as in C 1 q. 7 c. 9 and D 28 c. 13.

²¹⁷ See above in the discussion of the proctor.

²¹⁸ The decretal of Honorius II mentioned above and discussed above in chapter 2. For more on this decretal, Landau, "Gratian and the *Decretum Gratiani*," in *The History of Medieval Canon Law*, 48.

²¹⁹ See, for example, Pope Lucius III: x 2.7.5. On this decretal, Nörr, *Prozessrecht*, 14 n. 53.

²²⁰ On *fideiussio* in the classical law, Jolowicz, *Historical Introduction*, 310–11. Translating it as making a 'verbal agreement,' Gordon, "Translation and Interpretation," 66.

²²¹ The *Ordo* also cites C 3 q. 3 d.p.c. 4 §4.

²²² On the *libellus conventionalis*, compare the *De edendo*.

²²³ Compare Cod. 1.3.51pr. While this refers to those under *tutela*, and thus relates to some extent to the representation a suretor provides, there is nothing in it applying to the damages being discussed by the *Ordo*.

²²⁴ On the *cautio iuratoria* and other types of oaths strengthening surety, Berger, *Encyclopedic Dictionary*, 384.

Concerning the Judicial Order (Cap. xi)

When multiple legal proceedings are proposed,²²⁵ and both are civil in nature, but unequal, the rubric obtains which states 'let him who first appeals also first litigate,'²²⁶ as in C 7 q. 1 c. 5.²²⁷ If they are criminal and unequal, the greater takes precedence over the lesser, as in D 8 c. 2.²²⁸ If one is civil and another criminal, the criminal takes precedence sometimes over the civil and sometimes the civil over the criminal; (on the other hand) sometimes the criminal over the criminal, and sometimes the civil over the civil. A criminal proceeding takes precedence over the civil as when someone seeks an legacy from me by means of a testament and I say that it is false and then accuse him according to the *Lex Cornelia de falsis*.²²⁹ The civil proceeding takes precedence over the criminal as

225 On *quaestio* as a form of legal proceeding in the classical law, Berger, *Encyclopedic Dictionary*, 662. On the following section in the *Ordo Bambergensis* compared also with the *De edendo*, Litewski, *Zivilprozeß*, 328–29.

226 See also Dig. 5.1.29. 'Qui prior appellat prior agat.' Comparing the *De edendo* here, Litewski, *Zivilprozeß*, 325 and n. 358. On this maxim in the civil law commentary of the twelfth century, for example Rogerius' *Summa* on the Codex, but without reference to the *ordines*, Alessandro Giuliani, "L' Ordo iudiciarius medievale tra retorica e logica," in *Die Kunst der Disputationen. Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert*, ed. Manlio Bellomo (Munich: R. Oldenbourg, 1998), 140 and n. 20 and von Schulte, *Der Ordo*, 22 n. 2. Compare also, for example, *Summa Stephani*, ad C 3 q. 11: Si vero ambae sint principales et se invicem non contingentes, siquidem ambae sint civiles, quamvis inaequales, vel si ambae criminales et aequales, locum habet regula illa: Qui prior appellat, prior agat. Si vero criminales inaequales sint, maior praeferatur minori. Quodsi altera civilis, altera criminalis, de crimine utpote de maiori semper cognoscendum est prius.

227 The canon does consider precedence, the point being made, but the example is episcopal succession. It is an argument from analogy, but rather labored.

228 Compare the *Ordo* here with the *Summa Stephani* ad C 3 q. 11 c. 1 Civilis quaestio, praeiudicat civili, quando quis petit hereditatem a me, et ego dico, cum esse servum meum, ideoque petere non posse. Prius enim tractatur de libertate, etiamsi iudex, qui est in medio, cognoscere non possit de ea principaliter, hic tamen cognoscet de ea... Civilis praeiudicat criminali, ut, si quis accusetur plagii et dicat se non vendidisse liberum vel servum alienum, immo proprium: prius quaeritur, an servus fuerit, et eius. Criminalis praeiudicat criminali, ut si maritus accuset aliquem adulterii, iste obiiciat ei lenocinium, tractabitur prius de mariti lenocinio. Criminalis civili, ut si quis petat a me hereditatem ex testamento, ego dicam, testamentum esse falsum et accusum eum ad legem Cornelianam testamentarium de falsis.

229 Cod. 9.22.16. For the classical law, Henning Ernst Müller, *Falsche Zeugenaussage und Beteiligungslehre* (Tübingen: Mohr Siebeck, 2000), 11–12.

when someone is accused of kidnapping²³⁰ and he declares he did not sell a free man or another's servant but (only) his own and the question is raised whether the man was a slave and to whom he belonged.²³¹ The criminal process takes precedence over another criminal proceeding, for example, pandering over adultery.²³² The civil takes precedence over another civil proceeding as when someone seeks a legacy from me and I say that he is my slave. Certainly, in all these cases the material question ought first to be answered, if possible.²³³ You shall find all these in C 3 q. 11 d.p.c. 3. It must also be noted that the defendant, having been convicted,²³⁴ cannot counterclaim his accuser until that one is completely restored to all things²³⁵ or defamed about another crime, nor can he claim from a greater crime to an equal or lesser one, unless he first be absolved or restored as in C 3 q. 11 cc. 1–2, and C 4 q. 1 c. 2. Having been condemned in a civil trial,²³⁶ however, he cannot do this because the guilty and infamous cannot accuse others save in certain cases, as in C 2 q. 1 c. 14. If the defendant is not yet censured,²³⁷ and has great dignity, as in the case of prelates and clerics, and the accuser is of inferior dignity, as a layman,²³⁸

230 The phrase is 'accusetur de plagio.' It is *pelatio* in von Schulte's edition.

231 *Servus* is, of course, ambiguous in a twelfth-century context, though serf most is probably understood. On the twelfth-century discussion, without consideration of the *ordines*, Conte, *Servi mediavali*, chapters 2 and 3.

232 Cod. 11.41, on which see Berger, *Encyclopedic Dictionary*, 543, where *lenocinium* carries the penalty of *infamia*. On *lenocinium* in canon law, Brundage, *Law, Sex, and Christian Society*, 467 and n. 253, though without reference to our treatise. On laymen accusing clergy of sexual impropriety, Helmholz, "Discipline of the Clergy," 192–95.

233 Compare Placentinus, *Summa Codicis*, 3.8. See, in particular, Nörr, "Romanisch-kanonisches Prozessrecht," 40 and n. 18–19 on the civilians' discussion of the difference between *quaestiones incidentes* and *emergentes*, and whether the judge was to rule on the former separately during the course of the process or at its end. He discusses Bassianus, Baldus, and Bartolus, with a distinction, though much debated, between a material question (*incidens*) and procedural one (*emergens*). He does not treat our treatise; however, see Litewski, *Zivilprozeß*, 326 and n. 359, comparing the *Ordo* with Bulgarus.

234 On *condemnatus*, Berger, *Encyclopedic Dictionary*, 403.

235 This is *restitutio in integrum*.

236 On *damnatus*, Berger, *Encyclopedic Dictionary*, 424, generally in a capital crime.

237 On *notus*, Berger, *Encyclopedic Dictionary*, 599.

238 While the tripartite distinction of the 'three orders' did differentiate between those who worked, and those who fought, there was also a clerical understanding of the single 'lay order,' on which see Giles Constable, *Three Studies in Medieval Religious and Social Thought* (Cambridge: Cambridge University Press, 1995), 281, also discussing a separate distinction between *nobiles* and *inferiores*.

then the defendant is able to counterclaim against his accuser concerning an equal and lesser crime. This occurs because of the dignity of the accused, as in C 32 q. 7 c. 9 *si quis fuerit vituper.*,²³⁹ and C 3 q. 11 c. 3, which states that the accuser ought to purge himself by oath before he is received in accusation of the bishop. If, however, the defendant were of the same status,²⁴⁰ then he could counterclaim the greater crime against the accuser. Also, certain others say that when a lesser crime is objected, the one objecting the greater crime is prevented from raising an exception.²⁴¹

Concerning Exceptions²⁴² (Cap. XII)

The first exception is given to the defendant. This stands under a general name against the plaintiff. The second exception takes a specific name, 'replication',²⁴³ and is granted to the plaintiff against the defendant. Thereafter, exceptions multiply—*duplicatio*, *triplicatio*, *quadruplicatio* and more,²⁴⁴ as clearly gathered from C 29 q. 1 d.a.c. 1 which states that error prevents matrimony.²⁴⁵ Therefore, if a free man married his own serving girl or another (believing she was freed) and was then sued by her master, he is aided by the exception of servile condition,²⁴⁶ as stated in the same question.²⁴⁷ However, if she shall offer the exception of replication, that she received her freedom from him or knew that she was a free woman, she may defend herself with this, as found in the same *Causa*,

239 It is not at all clear how this canon, which involves bigamy and penance, fits the *Ordo* here.

240 The phrase is *communis status*.

241 It is uncertain who these are.

242 Litewski, *Zivilprozeß*, 304–05, comparing also the *De edendo* and sections of *Olim edebatur actio*.

243 See Litewski, *Zivilprozeß* 301 n. 37, 316 n. 249, comparing also *Olim edebatur actio* §486.

244 That these were in theory unlimited, Litewski, *Zivilprozeß*, 316 n. 260.

245 C 29 q. 1 d.a.c. 1§2. There is no explicit mention of exceptions in this canon but, as has happened already in the treatise's citations from Gratian, the subject of the canon might be used to illustrate them. See also Dig. 44.1.2.

246 Litewski, *Zivilprozeß*, 305 n. 84. This is not considered by the other *ordines* in this study. The decretists I have been able to consult did not consider exceptions when commenting on this *dictum*. Compare also Hariulf's parable in chapter 2.

247 See above, C 29 q. 1 d.a.c. 1§. 2.

q. 2 c. 3.²⁴⁸ Therefore, one says the exception is like an elision or exclusion of the suit. Thus, the replication undoes the first exception.

There are various reasons which introduce exceptions, as in C 31 q. 1 cc. 1–3.²⁴⁹ One reason is fear, as in C 15 q. 6 cc. 1–2.²⁵⁰ There is deception, as in *Extrav. Alex.* III., *propositum*.²⁵¹ There is the ‘object of a pending suit,’²⁵² as in C 11 q. 1 c. 50.²⁵³ There is the ‘revocation,’²⁵⁴ as in D 54 c. 19. There is the *generalis pactio*, as in C 12 q. 5 c. 3²⁵⁵ and C 27 q. 1 c. 1.²⁵⁶ There is the act of swearing an oath, as in D 85 c. 1.²⁵⁷ There is ‘interdiction,’²⁵⁸ as in C 35 q. 9 c. 1²⁵⁹ and C 25 q. 9 d.p.c. 2. There is error, as in C 29 q. 1 d.a.c. 1 and time, as in C 16 q. 3 c. 13 and C 16 q. 3 c. 14; age, as in C 30 q. 2 c. 1²⁶⁰

248 C 29 q. 2 c. 3.

249 On these canons and decretist commentary, Brundage, *Law, Sex, and Christian Society*, 247, 369 n. 215.

250 Compare Gilbert Foliot, Ep. 237, in Morey and Brooke, *Letters and Charters*, 310. Gilbert writes to Archdeacon Matthew of Gloucester concerning whether a woman accused of adultery should be put on oath or forced to submit to the ordeal. He declares that the oath suffices and that violence or its threat renders any oath invalid. See also, generally, Taliadoros, ‘Law and Theology.’

251 Pope Alexander III (JL 12636, WH 989.) Compare also *Collectio Francofurtana*, 4.13.

252 On *res litigiosa*, see above.

253 On this canon, see above.

254 On the *retractatio*, Berger, *Encyclopedic Dictionary*, 683, that it rescinded or revoked a judicial act.

255 *Generalis pactio* does not appear in the commentary on this canon by Rufinus, Stephen of Tournai, or the *Summa Simonis*. See Jolowicz, *Historical Introduction*, 209 and Nicholas, *An Introduction to Roman Law*, 25, 192. The civilian jurist Azo would use *pactum generale* when commenting upon Cod. 2.3.4, on which see Stephan Meder, *Die Bargeldlose Zahlung. Ein Rechtshistorischer Beitrag zur dogmatischen Einordnung des Kreditkartenverfahrens* (Frankfurt am Main: Klostermann, 1996), 80 n. 2. On the distinction between special and general suits, Nörr, *Prozessrecht*, 91.

256 The phrase is not found in Gratian here. Rufinus, Simon of Bisignano, and Stephen of Tournai also all confine their commentary to the vow, following Gratian, and do not discuss the pact.

257 The term in the *Ordo* is *iuratio*. Like the preceding citations, it is not in the canon cited, though an oath taken on the Gospels is.

258 On interdiction, Berger, *Encyclopedic Dictionary*, 507, also noting that ‘interdictal procedure’ was the claim requesting an interdict from the magistrate.

259 Again, Rufinus, Stephen, and Simon do not introduce this term into their commentary on Gratian here.

260 See also Gilbert Foliot, Ep. 162, a letter from 1166 to Pope Alexander III, in Morey and Brooke, *Letters and Charters*, 216 and Taliadoros, ‘Law and Theology.’

and C 20 q. 1 c. 10 and C 20 q. 2 cc. 1–2; favor, as in C 35 q. 6 c. 2;²⁶¹ and malice, as in D 70 c. 2²⁶² and C 31 q. 2 c. 1.²⁶³

Some stays are temporary or dilatory, others perpetual and peremptory.²⁶⁴ A temporary delay hinders proceedings for a period of time.²⁶⁵ A dilatory exception delays the proceedings. A perpetual exception permanently blocks all proceedings.²⁶⁶ A peremptory exception ends the trial. The first exception (temporary) must be opposed to the plaintiff's charge before the beginning of the joinder of issue,²⁶⁷ the others at some time before the sentence,²⁶⁸ as in C 3 q. 6 d.p.c. 2. Normally, whoever raises an exception ought to prove it,²⁶⁹ just as he who sues, as in C 6 q. 5 d.p.c. 1.²⁷⁰ Thus, to the extent he proves it, it appears that the defendant is suing by raising an exception to the charge, that is, he is performing the office of the plaintiff, as in D 54 c. 10.²⁷¹ There is no proof

261 The term in the *Ordo* is not in the canon cited. See, especially, Landau, "Papst Cölestin und die Anfänge des kanonischen Eheprozessrechts," 753–56.

262 The term does not appear in the canon cited. On the Council of Piacenza, see most recently Robert Somerville, *Urban II's Council of Piacenza* (Oxford: Oxford University Press, 2011).

263 *Odium*. Again, the term does not appear in this canon.

264 On *dilatio*, Berger, *Encyclopedic Dictionary*, 437 in regard to a successful exception. Comparing here the *De edendo*, *Practica legum*, cap. 24, and *Olim edebatur actio*, §439–445, Litewski, *Zivilprozeß*, 305 n. 98.

265 See Berger, *Encyclopedic Dictionary*, 596 on *exceptio nocet*.

266 Litewski, *Zivilprozeß*, 306 n. 99, comparing also the *De edendo*, *Olim edebatur actio* §442, and the conclusion to *Practica legum* provided by Legendre and Fransen translated above in chapter 4.

267 On *exceptiones litis ingressum impediennes*, van Rhee, "Role of Exceptions," 5–6, though without discussion of the *ordines*. On early-modern civilian commentary, Schlinker, *Litis contestatio*, 460–62. On this passage in the treatise, opposing an exception before the *litis contestatio*, Litewski, *Zivilprozeß*, 307 n. 123, comparing the *De edendo*, *Olim edebatur actio* §445, among many paragraphs, and *Practica legum*, cap. 23, 25.

268 Litewski, *Zivilprozeß*, 308 n. 134, comparing the *De edendo*, *Olim edebatur actio*, §444, 448, and the conclusion to the *Practica legum* provided by Fransen and Legendre translated above in chapter 4.

269 Dig. 22.3.9. Compare Bulgarus on this point.

270 See Helmholz, *The Ius Commune*, 13.

271 On the transmission of this canon, Landau, "Frei und Unfrei in der Kanonistik," 456–57. It does not seem to fit the treatise well. There is nothing as well in the Bolognese decretists consulted in this study that might clearly relate to the argument here. The canon could certainly be used to illustrate the possibility of an exception being raised. Compare, however, *Summa Lipsiensis*, commenting on the next canon cited by our treatise, C 6 q. 5 d.p.c. 1, *s.v. Accusatus usque exceptionem*: Quia reus in exceptione loco actoris habetur,

required from the one denying the fact of the case, provided that the exception is affirmatively made,²⁷² as in C 6 q. 5 d.p.c. 1.²⁷³ It should be allowed only to the extent that a *transactio* or a tardy confession of liability concerning the plaintiff's charge shall not have intervened,²⁷⁴ that is a surety and without calumny, because no one is able to claim more, that is, to request then that the appointed time be moved forward unless there is some pressing reason of necessity or utility as in D 79 c. 11,²⁷⁵ nor can it be requested that the trial be transferred from one church to another, unless he has surety from his own bishop, that is *litterae dimissoriae*.²⁷⁶

On Overclaims²⁷⁷ (Cap. XIII)

An overclaim is made in four ways: what is being claimed, time, location, and cause.²⁷⁸ This first is when one requests 20 for 10, as in C 14 q. 1 c. 2. It concerns time, for example when someone demands something before the legal date or condition,²⁷⁹ as in D 78 cc. 1–4.²⁸⁰ It concerns location as when someone requests something in a place other than what was specifically promised to him by stipulation, as in C 19 q. 3 c. 2–3²⁸¹

agere enim hiis uidetur qui exceptione utitur. See also Dig. 44.1.1. This has been treated by the *ordines* considered in earlier chapters.

272 Compare Dig. 22.3.2.

273 Compare also Gilbert Foliot, Ep. 96, a letter to Archbishop Theobald of Canterbury from July–August 1150, in Morey and Brooke, *Letters and Charters*, 134. The letter treats the dispute between four knights of Robert de Lacy and the earl of Hereford. The case had been suspended upon appeal to Theobald. See, in general, Taliadoros, “Law and Theology.”

274 On *transactio*, see chapter 3 for its discussion by the *De edendo*. On *confessio* as admission of liability, Berger, *Encyclopedic Dictionary*, 406 and, for its importance as evidence in late-antique civil law, Mousourakis, *Historical and Institutional Context*, 370. None of the decretists consulted on C 6 q. 5 d.p.c. 1 connect *transactio* and *confessio*.

275 This might illustrate delegation of a task by reason of necessity.

276 Compare the *De edendo*, on which see chapter 3 above.

277 On this section of the *ordo*, Litewski, *Zivilprozeß*, 235–36, noting that only a few *ordines* discuss *plus petitio*. Compare, however, the *De edendo*.

278 Inst. 4.6.33. Compare again the *De edendo* here.

279 On *condictio* in the classical Roman law, Jolowicz, *Historical Introduction*, 217 and Nicolas, *An Introduction*, 229–31. On these conditions in the *ordo*, Litewski, *Zivilprozeß*, 235 and n. 128, comparing also the *De edendo*.

280 These examples illustrate the point made in the *Ordo* but do not employ its terminology.

281 An interesting application of Gratian. On Gratian and canonistic discussion of a regular canon's entrance into monastic life, Landau, “Die duae leges im kanonischen Recht,” 155.

and C 7 q. 1 c. 31,²⁸² and C 21 q. 2 c. 1, and in many articles of secular law.²⁸³ It is by reason of cause if I promise you one of two things and you, though it was my choice, demanded the other only.²⁸⁴ If anyone shall have claimed more and maliciously extorted a surety but, before the joinder of issue,²⁸⁵ then did penance, he shall not be fined, since the mere attempt to commit a crime does not cause injury,²⁸⁶ for this man does not claim more in the trial but only wants to claim, as in C 33 q. 3 c. 14. After joinder of issue, the claimant convicted concerning an amount falsely added shall be punished with the amount of the whole debt.²⁸⁷ Convicted by this law, the enemy of the human race lost his battle with Christ, as Pope Leo (the Great) said: 'Indeed, the greedy and avaricious claimant persisted in plunder and, though having no right over Christ, had put forth his hands with injustice and, claiming more, the entire sum of the debt was removed and he lost his possession of the human race.'²⁸⁸ This is by civil law.²⁸⁹ However, if more is claimed concerning some thing,

282 Again, an interesting citation. On canon law and *plus petitio*, Litewski, *Zivilprozeß* 235 and n. 134.

283 On the *Actio de eo quod certo loco*, see Berger, *Encyclopedic Dictionary*, 342, and, in general, Dig. 13.4.0 and Cod. 3.18.0.

284 Compare the *De edendo* on which see chapter 3 above.

285 *Litis contestatio*.

286 On *simplex conatus*, Berger, *Encyclopedic Dictionary*, 401, also compared with 'endeavor' in English law.

287 On this, Wiegand, *Plus Petitio*, 38, though without consideration of the *ordines*.

288 A reference to Leo I, Sermo 22, *Sancti Leonis Magni Romani Pontificis tractatus septem et nonaginta*, ed. Antonius Chavasse, (Turnhout: Brepols 1973), 96.159–97.163: Perstitit ergo improbus praedo et avarus exactor in eum qui nihil ipsius habebat insurgere, et dum vitiatae originis praejudicium generale persequitur, chirographum quo nitebatur excedit, ab illo iniquitatis exigens poenam, in quo nullo reperit culpam... The *Ordo Bambergensis* may have been one of the first twelfth-century procedural treatises to use this text for, according to Wiegand, *Plus Petitio*, 36–37 and n. 1–2, it is with Bernard of Pavia, 1 Comp. 2 that we find it under the rubric *De plus petitionibus*. He does not note our treatise. For the theological background, G.M. Lukken, *Original Sin in the Roman Liturgy. Research into the Theology of Original Sin* (Leiden: Brill, 1973, rp. 1997), 207 and n. 195. On the twelfth-century discussion of *possessio* and *proprietas*, which may lie to some extent behind this, see above in Chapter 3, especially Cheney, "Possessio/Proprietas," also Tate, "Ownership and Possession," 292 on the developments in the 1180s, evidenced by the *Summa Quicumque vult* of Bassianus.

289 Compare here Placentinus, *Summa codicis*, 3.10 (De pactis), also Wiegand, *Plus Petitio*, 41 n. 25. For a fourteenth-century reversal (of sorts) of the argument, where Satan accuses Christ of having trespassed when He descended to Hell, see Eltjo Schrage, "Descendit

location,²⁹⁰ or cause, he will accordingly pay triple the advocate's fees²⁹¹ because it is an overclaim.²⁹² If he later claims more, let the length of the stays in the trial be doubled.²⁹³ Therefore, what shall we say if after joinder of issue he is not convicted but confesses? He must be treated more leniently, as in D 50 c. 3.²⁹⁴ Some legists say that he should be fined only the advocate's fee but others state that, after the joinder of issue, he shall pay them threefold.²⁹⁵

Concerning Compensation²⁹⁶ (Cap. XIV)

When considering someone who is both a debtor and creditor,²⁹⁷ it must be asked to whom he is indebted and who owes him, as in C 27 q. 2 d.p.c. 18, c. 19, c. 21 and in many passages of the (civil) law,²⁹⁸ which state that a man is held both to render the debt to the wife and also is able to

ad Infernos: And Belial Sued Jesus Christ for Trespass," in *Critical Studies in Ancient Law*, 353–65.

290 Comparing the *De edendo*, Litewski, *Zivilprozeß*, 237 and n. 150.

291 Litewski, *Zivilprozeß*, 237 n. 147.

292 These are the *sportulae*. See also Wiegand, *Plus Petitio*, 41, with reference again to Placentinus, *Summa Codicis*, 3.1, Kaser, *Zivilprozeßrecht*, 558, Brundage, *The Medieval Origins*, 39, Nörr, *Prozessrecht*, 203, and Litewski, *Zivilprozeß*, 570 and n. 14.

293 See a later decretal of Gregory IX (X 2.11.1) noted by Schlinker, *Litis contestatio*, 81 and n. 81.

294 On canonistic discussion of allowing lenient treatment of the guilty, Gunter Jerouschek, "*Ne crimina remaneant impunita*. Auf das Verbrechen nicht ungestraft bleiben: Überlegungen zur Begründung öffentlicher Strafverfolgung im Mittelalter," *ZRG KA* 120 (2003): 323–37, on the earlier penitentials treating those who had committed a crime because of poverty or hunger.

295 Compare Placentinus, *Summa Codicis*, 3.10: Quid ergo dicemus si post litem contestatam calumniosus petitor et cautionis exactor, non arguitur sed fatetur forte sicut diximus post litem contestatam in sportulas solas multabitur, ut alii dicunt, et ut diximus post litem contestatam neque arguitur, neque fatetur, sed reus absolvitur, licet lege ista haec non dicantur, tamen petitor tanquam uictus habendus est, et debiti summa vacuatur. On the threefold penalty, Wiegand, *Plus Petitio*, 41 and n. 23.

296 On *compensatio*, Berger, *Encyclopedic Dictionary*, 401. This was where the judge considered what the plaintiff owed the defendant from an earlier suit. The defendant only had to pay the balance if his debt were greater.

297 This is *confusio*. For the classical law, Anja Steiner, *Die römischen Solidarobligationen. Eine Neubesichtigung unter aktionsrechtlichen Aspekten* (Munich: C.H. Beck, 2009), 52–54.

298 Compare Dig 46.3.75. On the classical law, Kaser, *Zivilprozeßrecht*, 391 n. 37, also 482–83.

demand the debt from her.²⁹⁹ Thus, from the compensation of the debtor and creditor the contribution is made, unless perhaps they consent to remit the debt and thus compensation would intervene, if it be opposed as a counterclaim and not rejected, as in C 33 q. 5 c. 1, provided that if the reason is clear and legally made (and not after many disputes) there is compensation, whether owed from the reason of the suit or from the type of the crime, as in C 22 q. 2 c. 20, C 32 q. 4 d.a.c. 1, and C 23 q. 5 c. 6.³⁰⁰ The compensation runs to the extent that the amounts agree, as in C 23 q. 5 c. 6.³⁰¹ But both deceit and negligence are compensated, deceit with deceit, negligence with negligence, sin with sin, as in C 32 q. 6 cc. 1,³⁰² 2, 3.³⁰³ In each suit, compensation is opposed as a counterclaim save in the charges of robbery by force,³⁰⁴ and the failure to return a deposit.³⁰⁵ For today it is stipulated that no outside party, save the owner, may prevent anyone from the restitution of the deposit,³⁰⁶ as in the *Authenticum*.³⁰⁷ Profit does not compensate for it, as in C 33 q. 5 c. 1, C 1 q. 1 c. 27, and C 33 q. 4 c. 4, and C 32 q. 4 c. 3; nor is there compensation for shameful acts, as in D 14 c. 1, and C 22 q. 4 c. 3–7. However, eternal life can be gained through the compensation of suffering in this world, and that

299 For civilian discussion of the conjugal debt, see Kantorowicz, *Studies*, 252.20–23; for canon law, generally, Brundage, *Law, Sex, and Christian Society*, 358–60.

300 The type of crime described in the canon might be used to explain the treatise's argument; it does not, however, treat the related point of compensation save in the concluding phrase 'quia culpa leuis presenti supplicio compensata sit.' For the *Summa Parisiensis'* commentary on this canon, Brundage, *Law, Sex, and Christian Society*, 307 and n. 232. Rufinus dwells on forms and degrees of punishment; Stephen of Tournai follows the earlier commentary of Rolandus, which focuses on this as well. Compensation is not an issue.

301 See above, C 23 q. 5 c. 6.

302 On the canon treating deception and fraud in marriage, Brundage, *Law, Sex, and Christian Society*, 244.

303 This cluster of canons cited by our treatise, C 32 q. 6 cc. 1–3 is not treated by the decretists in the context of compensation.

304 On the *Actio vi bonorum raptorum*, Dig. 47.8.0 and Inst. 4.2. See Berger, *Encyclopedic Dictionary*, 346.

305 On the *actio depositi*, Inst. 4.6 and Berger, *Encyclopedic Dictionary*, 346.

306 Contrasting classical with contemporary jurisprudence. Compare also Bulgarus' discussion of the *condictio ob turpem causa and stipulatio*. See also Kantorowicz, *Studies*, 155 for the *Summa Trecensis'* treatment of *ob turpem causam*.

307 Cod. 4.34.10.

suffering can also make up for a lesser fault,³⁰⁸ as in C 22 q. 2 c. 20, and C 23 q. 5 c. 6 at the end. When called to court, the one standing surety shall make good concerning that to be given the one for whom he has interceded. The debt is made good neither by fixed date nor condition, nor shall it be compensated for another as suits your convenience, even when the other party desires it, as in D 14 c. 1, where it is said when compensation is not admitted so that we do something evil lest another do something worse.³⁰⁹

Concerning Witnesses³¹⁰ (Cap. xv)

Giving testimony in a trial is a public duty.³¹¹ Some witnesses, however, are rejected by the law, and others because of their office.³¹² As in C 3 q. 5,³¹³ the law rejects those held in public chains,³¹⁴ one who hired himself out

-
- 308 As Von Schulte, *Der Ordo*, 26 n. 1 notes, this illustrates the influence of civilian jurisprudence on theology.
- 309 Decretists certainly noted the canon's relevance to the question of greater or lesser evil; none, however, consulted for this study connect it to debt as is the case here.
- 310 Much of this is derived from the *Summa Rufini*. Compare also *Summa Lipsiensis*, D 14 c. 1: Nunc autem an eadem dispensatio locum habeat in diversis personis querit magister noster, scilicet quis committere possit minora, ne alius gravioribus implicetur, quod nequaquam est faciendum. See Charles Donahue, Jr. "Proof by Witnesses in the Church Courts," in *On the Laws and Customs of England. Essays in Honor of Samuel E. Thorne*, ed. Morris Arnold et al. (Chapel Hill: University of North Carolina Press, 1982), 132, also Lévy, *La Hiérarchie*, 70 n. 14.
- 311 In general, Mausen, *Veritatis adiutor*, 29, 152, also Litewski, *Zivilprozeß*, 395 n. 582, noting this formulation is also found in *Olim edebatur actio* but not in the other *ordines* in this study. Lévy, *La Hiérarchie*, 70 and n. 19, notes also Bassianus, *Libellus* §376. Some sense of how vital witnesses were for contemporary procedure may be gained from a remarkable list concerning a dispute between Italian monastery and a local, noble family discussed by Wickham, *Courts and Conflict*, 213. At least seventy persons, of all ages and classes (including clergy), and even women were interrogated.
- 312 Compare Placentinus, *Summa Codicis*, 4.20: Repelluntur autem testes alias ipso iure, alias per officium iudicis. Noting the *ordo*'s tendency, shared with others, to provide negative definitions, Mausen, *Veritatis adiutor*, 450–51.
- 313 C 3 q. 5 d.a.c. 1.
- 314 See C 4 q. 3 d.p.c. 3, also Dig 22.5.3§5. The sense is imprisonment, on which see Mausen, *Veritatis adiutor*, 492 and n. 388.

to fight with wild beasts,³¹⁵ and those who made a profit³¹⁶ by having accepted money for giving testimony, as in C 4 q. 3 c. 3.³¹⁷ Again, those are rejected who, according to certain ones, once gave testimony in a civil matter against someone and now desire again to speak against him, as C 4 q. 3 c. 3 §Item.³¹⁸ Also rejected are domestic servants and those from the household.³¹⁹ These are not able to give testimony in either a criminal or civil case, according to certain commentators, whose error is refuted on the basis of C 35 q. 6 c. 2.³²⁰ Domestic servants are those who come from the household or are connected to it in some necessary way.³²¹ They cannot save in situations: when a church has a civil case against another church or someone else,³²² as in C 14 q. 2 c. 1, and dissolving marriage,³²³ as in C 35 <q. 8?> cc. 1,³²⁴ 2,³²⁵ 3.³²⁶ Parents are also not heard against sons, nor sons against parents, as in C 4 q. 3 c. 3 §34.³²⁷ Women are not able to give witness in testaments or criminal cases, as in

315 The word is *harenarius*, on which see Mausen, *Veritatis adiutor*, 503 and n. 426, citing also Dig. 22.5.21§, received by Gratian at C 4 q. 2/3 c. 3§17/.

316 On Bulgarus and *turpem questum*, Pennington, "Big Bang," <http://faculty.cua.edu/pennington/BigBangRomanLaw.htm> accessed on 18 June 2012.

317 C 4 q. 3 c. 3§3, on which see also Mausen, *Veritatis adiutor*, 499 and n. 403.

318 C 4 q. 3 d.p.c. 2: II. Pars.

319 C 4 q. 3 c. 3 §31. In general, Lévy, *La Hiérarchie*, 70 n. 16 and, for the treatise here, Litewski, *Zivilprozeß*, 391 n. 526. Compare the *De edendo*.

320 Again, the treatise turns to an analogy from marriage, here to challenge the unnamed commentators who reject any testimony from family or household. For example, the *Summa Simonis* notes in its commentary on C 2 q. 1 c. 7: *Domestici enim regulariter repelluntur*. The *Ordo Bambergensis* notes that this canon from Gratian, a *palea*, gives an exception in the case of disputed marriage.

321 Mausen, *Veritatis adiutor*, 548 and n. 622, comparing the *De edendo*. See C 3 q. 5 cc. 1, 12 and C 14 q. 2 in general.

322 Mausen, *Veritatis adiutor*, 549 and n. 628.

323 Litewski, *Zivilprozeß*, 392, 396 n. 607. These exceptions, marital and ecclesiastical disputes, are not treated by the other *ordines* in this study.

324 Possibly, C 35 q. 8 c. 1. See Brundage, *Law, Sex and Christian Society*, 304 and n. 211.

325 Possibly C 35 q. 8 c. 2.

326 Possibly C 35 q. 8 c. 3.

327 Compare Bulgarus on this point, and Litewski, *Zivilprozeß*, 391 n. 509, 513, also Mausen, *Veritatis adiutor*, 561 and n. 383 noting also *Olim edebatur actio*.

C 33 q. 5 c. 19.³²⁸ However, they can in a civil case, as in C 15 q. 3 c. 2.³²⁹ Advocates, however, may not testify for those whom they defended, nor may judges testify in cases where they are, or were, judging,³³⁰ as C 4 q. 3 c. 3 §19 and C 2 q. 6 c. 38.³³¹ They are also rejected who gave the same premeditated statement,³³² as in C 4 q. 3 c. 3 §27³³³ and C 3 q. 9 c. 17. Not only are enemies of the defendant rejected,³³⁴ but also those suspect in some way, as in C 3 q. 5 c. 5. A single witness shall not be heard so that a judgment may be made on the basis of his testimony alone,³³⁵ but according to him whenever there is presumption, as in C 4 q. 3 c. 3 §38.³³⁶

-
- 328 Von Schulte notes that a marginal gloss, treating 'excepted crimes,' adds *nisi in crimine laesae maiestatis et symoniae*. On the prohibition of women testifying, Mausen, *Veritatis adiutor*, 465 and n. 247, also 466 and n. 256; also Litewski, *Zivilprozeß*, 385 with reference also to *Olim edebatur actio* §384.
- 329 On this, Litewski, *Zivilprozeß*, 385 n. 416.
- 330 Litewski, *Zivilprozeß*, 394, also Mausen, *Veritatis adiutor*, 540 and n. 589, 590, noting also Dig. 22.5.25, which was the text received here by Gratian.
- 331 The canon states that clerics may not be compelled to judge or testify.
- 332 Compare Bulgarus on this point, on which see also Mausen, *Veritatis adiutor*, 609 and n. 78, noting also a parallel with the decretist *Summa 'Elegantius in iure divino'* (Coloniensis); for similar concern about premeditation in *Olim edebatur actio*, Litewski, *Zivilprozeß*, 404 n. 742.
- 333 Compare also Dig. 22.5.3.1.
- 334 Litewski, *Zivilprozeß*, 392 n. 541, also Mausen, *Veritatis adiutor*, 570 and n. 730, also 572 noting Dig. 22.5.23, received by Gratian at C 4 q. 2/3 c. 2.
- 335 Cod. 4.20.9 (Cod. Th. 11.39.3), also Cod. 4.20.4 and Dig. 22.5.12. For the civil law, Antonio Metro, "Unus Testis, Nullus Testis," in *Critical Studies in Ancient Law*, 109–116. For canon law, André Gouron, "Testis unus, testis nullus dans la doctrine juridique du xii siècle," in *Mediaeval Antiquity*, ed. Andries Welkenhuysen et al. (Louvain: Leuven University Press, 1995), 83–94 and Lévy, *La Hiérarchie*, 69. See also C 4 q. 2 and 3 c. 4 §26.
- 336 On *presumere*, Beger, *Encyclopedic Dictionary*, 646. For presumptions in the classical law, Mousurakis, *Historical and Institutional Context*, 213 and Knut Wolfgang Nörr, "On the Early History of prima facie. Evidence in German Law," in *The Law of Presumptions: Essays in Comparative Legal History*, ed. R.H. Helmholz and W. David H. Sellar (Berlin: Duncker and Humblot, 2009), 78 and, for the medieval canon law, in the same volume, R.H. Helmholz, "The Law of Presumptions and the English Ecclesiastical Courts," 138–40, discussing the influence of the Biblical story of Solomon's judgment and also noting Gratian's lack of treatment of presumption, in contrast to its presence soon after in papal decretals. See, more generally, Motzenbäcker, *Die Rechtsvermutung*, also Helmholz, *The Canon Law*, 331–33; Lévy, *La Hiérarchie*, 27 and n. 24, treats our treatise, along with other texts, among them Placentinus, *Summa Codicis* 4.19 and Bassianus, *Libellus* §368. See also, in general, Nörr, *Prozessrecht*, 169–72 on categories and rules of presumption. Reflection on presumption was also not confined to the civilians, decretists or *ordines*,

Nor may someone testify in his own case,³³⁷ as in the same *dictum* from Gratian. Certain ones also say a serf may not be heard as a witness save in the most serious crimes,³³⁸ as in C 2 q. 1 c. 7,³³⁹ C 2 q. 1 c. 14, and C 6 q. 1 d.p.c. 22 and C 12 q. 2 d.p.c. 58,³⁴⁰ or unless there is a lack of evidence,³⁴¹ in which case fewer valid proofs are allowed, as in C 4 q. 3³⁴² and C 14 q. 2 c. 2. You should understand the same obtains for criminal and infamous crimes. Additionally, hearsay is not received, save in two cases:³⁴³ marriage

on which see Peter Landau, "Der Archipoeta—Deutschlands erster Dichterjurist. Neues zur Identifizierung des politischen Poeten der Barbarossazeit, *Bayerische Akademie der Wissenschaften. SB Philosophisch-Historische Klasse* 3 (2011): 39–40, where the Archpoet contrasts *necessitas* and *praesumptio*. Finally, for an even broader view, James Franklin, *The Science of Conjecture: Evidence and Probability Before Pascal* (Baltimore: Johns Hopkins University Press, 2001), 20–23 and, more recently, his essay "Probable Opinion," in *The Oxford Handbook of British Philosophy in the Seventeenth Century*, ed. R. Anstey (Oxford: Oxford University Press, 2013), 350–51, accessed at <http://web.maths.unsw.edu.au/~jim/ox17th.pdf> on 1 August 2014.

337 Litewski, *Zivilprozeß*, 393 n. 551, comparing also the *De edendo*.

338 Mausen, *Veritatis adiutor*, 558–59 and n. 667, noting Dig. 22.5.7, received by Gratian at C 4 q. 2/3 c. 3§4; also Litewski, *Zivilprozeß*, 386 n. 432. On the exclusion of a slave, compare Bulgarus in chapter 2 also, generally, Gilchrist, "The Medieval Canon Law on Unfree Persons," 285–87.

339 An example of decretist comment on this canon comes from the *Summa Stephani*: *Hinc habetur, quia, licet sine delectu quilibet admittatur ad accusationem simoniae, laesae maiestatis et haereseos, ibi tantum sine delectu admittuntur, sive servi sive alii, ubi de aliquo istorum accusetur, qui alias minus integre famae est*. On this, Charles Donahue, "P 265=JL 16635? A Mild Heresy Stated and Defended," in *Ins Wasser geworfen*, 171, with reference to our *Ordo* and comparisons with other authors, including Bulgarus' letter and *Olim edebatur actio*. He also notes that other *ordines* do not take up the question of generally excluded witnesses being allowed to testify in certain cases. On *maiestas* in our *ordo*, and noting congruence also with Rufinus, Mausen, *Veritatis adiutor*, 656 and n. 190, also 558 and n. 666, also Landau, "Der Begriff Ordo in der mittelalterlichen Kanonistik," 392.

340 C 12 q. 2 d.p.c. 58: §. 4.

341 Noting this, Litewski, *Zivilprozeß*, 386 n. 431.

342 It is unclear which canon is meant.

343 The treatise follows the *Summa Rufini ad C* 3 q. 9 closely here and in the following lines. On hearsay, *testimonium de auditu*, Alessandra Bassani, "Necessitas ius constituit: la testimonianza de auditu alieno nelle fonte canonistiche," in *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, ed. Orazio Condorelli, et al. (Cologne, Weimar, and Vienna: Böhlau, 2009), 215–48, though without reference to our treatise. Discussing Rufinus' commentary, Hermann, "The Establishment of a Rule Against Hearsay," 39, and n. 273 on this metaphor in the *Ordo Bambergensis* shared with the contemporary *ordo Scientiam*, also Nörr, *Prozessrecht*, 144. On the hierarchy of witnessing as understood in contemporary

or where, after a debt has been legally repaid, which the creditor declares has been made, there are witnesses who differ from the declaration of the creditor and state to the contrary that only a part has been repaid or if the debtor confesses that he owes money.

After being called, the witnesses are obviously then examined, as in C 3 q. 9 d.p.c. 15.³⁴⁴ It must also be noted that testimony made from hearsay is said to be twofold: either we learned and knew it from our own ears or we learned that it was so from the report of others.³⁴⁵ The first is improperly called hearsay,³⁴⁶ and more properly is about seeing concerning that which, when it was happening, one was perceiving it fully by seeing.³⁴⁷ Sight is accepted for each corporeal sense:³⁴⁸ touch and see,³⁴⁹ taste and see,³⁵⁰ smell and see,³⁵¹ hear and see;³⁵² and *Exodus* says: ‘the voices were seeing,’³⁵³ that is, they were hearing.³⁵⁴ Therefore, such testimony must be accepted everywhere, just as concerning what we see with our bodily eyes. Properly said, however, hearsay is not acceptable unless

Lucca, sight, hearsay (‘of dubious validity’), and public reputation, Wickham, *Courts and Conflict*, 76.

344 C 3 q. 9 d.p.c. 15: 11. Pars.

345 This argument is unique, as far as I know, in the *ordines*.

346 Compare the discussion by Bulgarus, chapter 2 and Litewski, *Zivilprozeß*, 405 n. 757, noting this distinction made by our treatise.

347 Mausen, *Veritatis adiutor*, 618–620.

348 Mausen, *Veritatis adiutor*, 620 and n. 109, noting also the *Summa Lipsiensis* here; see also Litewski, *Zivilprozeß*, 404–05 and nn. 750–753. The *Ordo Bambergensis* differs little from the *Summa Rufini*, ad C 3 q. 9: Visus enim pro omni corporis sensu accipitur, sicut Augustinus dicit super Iohanem “Unde palpate et videte, gustate et videte,” et dicimus frequenter “Olpha et vide, audi et vide.” Et propterea tale testimonium ubique est accipiendum, sicut de ea re, quam corporeis oculis videmus. On the role of the senses in medieval law, Bernard J. Hibbitts, “Coming to Our Senses’: Communication and Legal Expression in Performance Cultures,” *Emory Law Journal* 41 (1992): 873–960. Such treatment of the witnesses and senses in the *Ordo Bambergensis* is not found in other *ordines* considered by this study.

349 Luc. 24:39.

350 Ps. 33:9.

351 Augustine, *In evangelium iohannis*, *Tractatus* 121, accessed at http://www.augustinus.it/latino/commento_vsg/omelia_121_testo.htm on 16 July 2013; Nam et per alios quatuor sensus nominari solet: velut cum dicimus: Audi et vide quam bene sonet, olfac et vide quam bene oleat, gusta et vide quam bene sapiat, tange et vide quam bene caleat. Ubique sonuit: Vide, cum visus proprie non negetur ad oculos pertinere.

352 Ps. 41:11.

353 Ex. 20:18. (*populus videbat voces* in the Vulgate).

354 Mausen, *Veritatis adiutor*, 621 and n. 114, comparing also other, decretist works.

as in the aforementioned cases and especially in those whose origins exceed our memory.³⁵⁵ Again an uncalled witness is understood as able to testify, as in C 4 q. 3 c. 3 §25. In every judgment, unless a greater number is required,³⁵⁶ two witnesses suffice,³⁵⁷ as in the same *dictum* of Gratian.³⁵⁸ They ought to testify whose good faith does not waver.³⁵⁹ If more witnesses are introduced by both parties, those ought to be believed whose testimony is closer to the truth.³⁶⁰ The number of witnesses ought not to be taken into account but, instead, the sincere faith of those more assisted by the light of truth, as in C 4 q. 3 c. 3.³⁶¹

Concerning witnesses, one must carefully ask about their condition, that is, whether a witness is a citizen, of honest and blameless life, or whether he is said to be reprehensible, since witnesses ought to be beyond any exception that might be raised,³⁶² and whether they are wealthy or poor, etc., all (qualities) listed in C 4 q. 3 c. 3 §2 and C 2 q. 1 c. 7. Again, although witnesses can be compelled to testify,³⁶³ something proven by various canonical passages, nevertheless the Roman church has been accustomed never to force anyone to offer testimony.³⁶⁴

-
- 355 Mausen, *Veritatis adiutor*, 616 and n. 98, noting also congruence with various decretist *summae*. As we saw in the consideration of prescription in chapter 3, memory greatly concerned twelfth-century law. For a study of memory and its limitations in twelfth-century law and theology, Christoph H.F. Meyer, "Spuren im Wald der Erinnerung. Zur Mnemotechnik in Theologie und Jurisprudenz des 12. Jahrhunderts," *Recherches de théologie et philosophie médiévales* 67.1 (2000): 10–51.
- 356 Mausen, *Veritatis adiutor*, 518 and n. 498; also Litewski, *Zivilprozeß*, 411 n. 857. There is no indication, however, what case might require this.
- 357 Litewski, *Zivilprozeß*, 411 n. 855, comparing also *Olim edebatur actio*, §407.
- 358 C 4 q. 3 c. 3 §26, which is, however, not a *dictum* of Gratian. See also Dig. 22.5. Comparing our *Ordo* here with *Olim edebatur actio* and the *De edendo*, Litewski, *Zivilprozeß*, 410–11, nn. 849, 851.
- 359 Dig. 22.5.1pr. The text is also used by the *De edendo*, on which see chapter 3.
- 360 Mausen, *Veritatis adiutor*, 655 and n. 212.
- 361 Mausen, *Veritatis adiutor*, 663 and n. 209, comparing Dig. 22.5.21§3. Noting a similar formulation derived from this *dictum* by the contemporary French *ordo*, *Tractaturi de iudicis*, Donahue, "Proof by Witnesses," 132 n. 30. On this point in the *Ordo Bambergensis*, Litewski, *Zivilprozeß*, 414 and n. 897, something not discussed in the other *ordines*.
- 362 Litewski, *Zivilprozeß*, 381, also 413 n. 887, comparing Bulgarus and Mausen, *Veritatis adiutor*, 59–60 on exceptions against witnesses.
- 363 Nörr, *Prozessrecht*, 134–35, also Litewski, *Zivilprozeß*, 394 n. 580, noting Bulgarus.
- 364 Litewski, *Zivilprozeß*, 395 n. 586, comparing *Olim edebatur actio*, §376. On this, noting the English contemporary decretist, Honorius, Whitman, *The Origins of Reasonable Doubt*, 103–04, emphasizing the crown's efforts to compel witnesses to testify.

However, if he possibly feared the opposing party,³⁶⁵ it falls to the judge to summon him again to give testimony, as in *Extrav.* to the Bishop of Genoa, *Super eo*³⁶⁶ and *Unde porro*.³⁶⁷ The witness is also rejected when accused of a crime in a civil case and convicted by the civil law. However, on account of this he ought not be punished, as (declared) in the *Extrav.* to the Bishop of Winchester.³⁶⁸ Similarly, neither a heretic nor a Jew may be admitted to testify against a Catholic, as in C 2 q. 7 c. 26³⁶⁹ and C 2 q. 7 c. 24.³⁷⁰ Therefore, witnesses ought to swear (and can be compelled to do so) since one is not a witness unless he has sworn,³⁷¹ as in C 2 q. 1 c. 7 and C 3 q. 9 c. 20, either with the party present or contumaciously absent.³⁷² They ought to swear absolutely that they saw and heard and it was done in their presence, as in C 3 q. 9.³⁷³

Witnesses are able to be produced by the same man in the same trial and against the same party up to four times. But the fourth witness ought not be brought without some legal solemnity, which is contained expressly in the laws.³⁷⁴ When the statements of the witnesses shall have been published, there can be disputation, as in *Extra. Licet*

365 On witnesses' fears, Whitman, *The Origins of Reasonable Doubt*, 75.

366 Pope Alexander III, (JL 9032, 9033, 9034, X 2.21.3). Compare also *Collectio Francofurtana*, 44.2 On *crimina notoria* see Giovanni Minnucci, "Diritto e processo penale nella prima trattatistica del XII secolo: qualche riflessione," in *Ins Wasser geworfen*, 590–91 and n. 45, also Lévy, *La Hiérarchie*, 43–45 on *notorium facti*. See also McAuley, "Canon Law and the End of the Ordeal," 487–88 on canonists' criticisms of judgments based on notoriety alone. On the maxim *notorium non eget probatione*, Nörr, *Prozessrecht*, 125 and Litewski, *Zivilprozeß*, 444 and n. 1287. On canon law and local norms about *fama* and what was notorious, Wickham, *Courts and Conflict*, 270.

367 Pope Alexander III (Comp. I. 2.13.13, JL 9226). On the *Ordo Bambergensis* here, Mausen, *Veritatis adiutor*, 158 and n. 119.

368 Pope Alexander III (Comp. I. 2.13.13, JA 9226). See Mausen, *Veritatis adiutor*, 446 and n. 179. Also compare also *Collectio Francofurtana*, 38.1 and 21.5. The question of the objection of a crime having been committed by a witness is not found in the other *ordines* in this study. As noted in the introduction to this chapter, it is a good example, however, of an issue that probably was common in ecclesiastical procedure.

369 Mausen, *Veritatis adiutor*, 510–11 and n. 464, 456, noting C 3 q. 4 c. 11. See also Nörr, *Prozessrecht*, 136 and Litewski, *Zivilprozeß* 390 n. 502. Other *ordines* do not treat this, though compare *Olim edebatur actio* §384.

370 The exclusion of Jews is not treated by the other *ordines* considered in this study.

371 Mausen, *Veritatis adiutor*, 193 and n. 295, also Litewski, *Zivilprozeß*, 399 and n. 663.

372 Mausen, *Veritatis adiutor*, 125 and n. 338.

373 Presumably the entire *quaestio*. On the *ordo* here, also Placentinus, Mausen, *Veritatis adiutor*, 207 and n. 353.

374 I am not certain which text is meant.

praeter solitum.³⁷⁵ Nevertheless, one cannot always produce witnesses four times,³⁷⁶ though the fourth may follow. Always four times.³⁷⁷ For if any delay was denied, either a second after the first, a third after the second, whether once or more than once, and one produced a witness, he is unable to produce any more:³⁷⁸ therefore, sometimes (a witness may be produced) once, sometimes more than once, as twice, three,³⁷⁹ four times, but never more than four.³⁸⁰ It ought further be known that the examination of witnesses was introduced neither through the civil law nor the canons but by Daniel,³⁸¹ (it was) an allegation by

-
- 375 To the Archbishop of Salerno: Pope Alexander III (JL 9413, X 2.20.15). Compare *Collectio Francofurtana*, 2.1. On this decretal, Anne J. Duggan, "The Nature of Alexander III's Contribution to Marriage Law, with Special Reference to "Licet preter solitum,"" in *Law and Marriage in Medieval and Early Modern Times*, ed. Per Andersen and Ditlev Tamm (Copenhagen: DJØF, 2012), 43–64, though not treating our treatise's reception of the letter.
- 376 Mausen, *Veritatis adiutor*, 80 and n. 149.
- 377 Perhaps an intruded gloss? On multiple witnesses, Lévy, *La Hiérarchie*, 68–72, without discussion of any rule of four. Compare *Olim edebatur actio*, §413–416 and *Iudicium est trinus personarum*, on which see Litewski, *Zivilprozeß*, 368 n. 199. In general, John H. Wigmore, "Required Numbers of Witnesses: A Brief History of the Numerical System in England," *Harvard Law Review* 15.2 (1901): 83–108.
- 378 On the prohibition of additional witnesses, Mausen, *Veritatis adiutor*, 305.
- 379 Litewski, *Zivilprozeß*, 395 n. 600.
- 380 On numbers of witnesses in contemporary English ecclesiastical depositions, Donahue, "Proof by Witnesses," 137–40, also discussing the degree to which there was a 'jurylike procedure.'
- 381 Dan. 13. 51. On Susanna and the Elders, among many studies, Mausen, *Veritatis adiutor*, 272 and n. 177 comparing also Placentinus; Eltjo J.H. Schrage, "*Iudex Bonus Vir Dicitur*," in *Miscellanea Dominico Maffei*, 2. 85, discussing the Biblical story in the context of how many *personae* were needed in a valid trial and whether Daniel was both judge and accuser. For the Carolingian period, specifically how Hincmar of Rheims understood the story, Firey, *A Contrite Heart*, 42–60, considering especially his view of Teutberga's divorce by Lothar. The story also appears in the tenth-century *Vita* of Bruno of Cologne, on which see Hartmann, "Probleme des geistlichen Gerichts," 643. See also Helmholz, "The Bible in the Service of the Canon Law," 1573–74, noting canonists' treatment of the expulsion of Adam and Eve from Paradise as a model for canonical procedure, and Litewski, *Zivilprozeß*, 380 n. 345. Reynolds, "The Emergence of Professional Law," 355–56, notes that taking separate testimony had long been a practice in Italy, at least as early as the eighth century, while collective testimony had been customary north of the Alps; also 357 and n. 35 arguing that the 'first surviving *ordo* to require separate and private examination of witnesses seems to have been written c. 1182–85. It says that separate examination was introduced 'non per leges nec per canones, sed per Danielelem . . .' calling attention to this in Richardus Anglicus; compare also E. Genzmer, "Eine anonyme Kleinschrift de testibus

Solomon,³⁸² not a repetition.³⁸³ This (woman) indeed said ‘you are my son,’³⁸⁴ and took (him) after judgment.³⁸⁵ Again it ought to be known,³⁸⁶ that since a diversity of places impedes testimony,³⁸⁷ just as in the case where one man spoke under an oak and the other under a mastic tree,³⁸⁸ likewise, there are different times, when one says that he saw on one day and the other, on another, as in C 3 q. 9 c. 16. Certain authors say that this legally obtains in matters unchanging and unrepeatable, for example

aus der Zeit um 1200,” in *Festschrift für Paul Koschaker*, 3 vols. (Weimar: Verlag Hermann Böhlaus, Nachfolger, 1939), 3.82–83, 91–92. There is, however, no consideration of our treatise. See also Brundage, *Medieval Origins*, 436–37, again without reference to the *Ordo Bambergensis* as well as Nörr, *Prozessrecht*, 143. Lévy, *La Hiérarchie*, 101 and n. 70, however, notes it. See also Hermann and Speer, “Facing the Accuser,” 516–19 on how twelfth century canon law’s commentary on the Biblical story demonstrates not only a break with Nov. 90 c. 2 which required plaintiff and defendant, though not witnesses, to be present, but also highlights a shift towards limiting ‘the right to see opposing witnesses.’ Among other studies, Franklin, “Probable Opinion,” 352 and Helmholz, *The Canon Law*, 340–41, noting exceptions considered by the jurists, for example witnesses’ inconsistent or too congruent testimonies.

382 In the sense of proof.

383 Referring to the judgment of Solomon. 1 Kings 3.16–28. On *repetitio* in the classical law, compare Bulgarus in chapter two. The sense, I believe, is that Solomon made a judgment, not an exception.

384 Compare also Ps. 2.7 and Mk 1.11.

385 11 Samuel 12.24.

386 Closely following *Summa Rufini ad C 3 q. 9 c. 16*, s.v. *Simul*: Sicut locorum diversitas impedit testimonium—utpote in illis, quorum unus dixit sub prino, alter sub cino—ita et varietas temporum, ut: si unus dicat se vidisse uno die, alius alio die. Si autem eadem hora vidissent, licet diversorum momentorum intervallis, legitime recipentur. Fuerunt autem qui dicerent hanc temporis diversitatem testimonium impedire solum in his, que semel et subito facta iterari non contingit. Sicut si accusetur iste de homicidio sui episcopi inducanturque testes ad probandum hoc homicidium, si unus testium dicat se in die sabbati vidisse istum super episcopum mortiferum vulnus misisse, alius in die Dominica: tunc diversitas temporum derogate, inquirunt, fidei testium. Sic in furto et quibusdam aliis. Si autem de his rebus, que vel iterari habent vel longa temporis continuatione produci, ferri debeat testimonium, tunc temporum varietas sinceritatem testium nullatenus denigrabit: ut: si quisquam de adulterio accusetur et unus testium dicat adulterium commissum uno die, et alius alio.

387 Litewski, *Zivilprozeß*, 415 n. 905, not treated by the other *ordines* in this study.

388 Dan. 13.54. See Bernard S. Jackson, *Essays on Halakah in the New Testament* (Leiden: Brill, 2008), 90 and n. 11.

homicide.³⁸⁹ However, in matters which can be repeated or prolonged for a long period of time, difference in times in no way denies the integrity of the witnesses, for example, if someone is accused of adultery, and witnesses should come, and one says it was committed on one day, but another says on another day. However, this judgment should be voided if one pays attention to what was said about the oak and mastic trees,³⁹⁰ though those who believe this concerning these trees explain it so: those elders first asserted that they had seen once and afterwards,³⁹¹ having been separated, then contradicted each other and,³⁹² with their differing accounts tested, were rejected, having declared the same time but not the same location.³⁹³ This may in no way be preserved. However, if one witness said that he knew the time and place but the other did not remember the place and time, but nevertheless knew best the truth of the matter, and the first said little and the another supplemented his testimony, the testimony of both is heard. Also, the testimonies of both parties must be received by other judges along with other suitable witnesses, unless they were already made known, as in *Extrav. Causa quae inter ar.*³⁹⁴ It must also be understood that, concerning the question that has been judged, it happens that new legal questions³⁹⁵ emerge and because the witnesses were informed that one party wishes to bring forward new witnesses or that the witnesses already heard now accept something new, we believe it permissible at least that the new questions can be received, as in *Extrav.*

389 Mausen, *Veritatis adiutor*, 655 and n. 188, also comparing various decretists, among them *Summa Rufini*, ad C 3 q. 9 c. 16: In his, inquam, et similibus casibus, ut aiunt, diversitas temporum non impedit fidem testium. Similiter et locorum, nisi aliquid intervenisse constiterit, quod esset impedimento, ne illud iterato vel continuatim fieri potuisset. There is, however, no mention of homicide as an example here or in the *Summa Stephani*, *Summa Simonis* or *Summa Lipsiensis*.

390 Again, compare *Summa Rufini* ad C 3 q. 9 c. 16, which the *Ordo Bambergensis* closely follows: Tamen hec sententia satis reprobanda videtur, si illud, quod est predictum de 'sub prino et sub cino,' attendatur. Licet ipsi, qui hoc tradunt, de prino et cino sic excipiant, ut dicant illos sense prius asseruisse quod simul viderint—sed postea seorsum ducti contrarium dixerunt, et ideo non mirum, si pro hac diversitate reprobati fuerunt: confessi sunt enim identitatem temporis, sed non identitatem loci.

391 The edition gives *semel*, though *simul*, as in Rufinus, makes more sense.

392 Mausen, *Veritatis adiutor*, 662–63 and n. 206.

393 On rejection of witnesses, Litewski, *Zivilprozeß*, 415.

394 Pope Alexander III (JL 13831, x.2.20.11). See here Litewski, *Zivilprozeß*, 408 n. 808, noting that statements given in other processes might be received by the judge.

395 The word is *capitula*, on which see Litewski, *Zivilprozeß*, 402 n. 718.

Fraternitati tuae.³⁹⁶ In sum, it must be noted that if it is the case that I am compelled to admit a gladiator,³⁹⁷ or someone similar, as a witness, his testimony must not be credited without torture, as in C 4 q. 2/ c. 3 §17,³⁹⁸ C 2 q. 1 c. 7,³⁹⁹ and C 5 q. 5 c. 4. Again, it must be known that a false witness sins three ways⁴⁰⁰ and, thus, a threefold penalty is inflicted on him. Indeed, he sins against God,⁴⁰¹ Who is the Truth, and thus he is punished with a seven-year penance, as in C 6 q. 1 c. 18. He sins against the judge, whose presence he deceives, and accordingly becomes infamous and is henceforth unable to testify,⁴⁰² as in C 22 q. 5 c. 7. He also sins against his neighbor, whom he injures, since he alters the truth with his lie and,⁴⁰³ accordingly, ought to suffer retaliation, as in C 3 q. 9 c. 16. It also seems we must add that if someone reveals those things about which his witnesses

396 To the bishop of Piacenza, Pope Alexander III (JL 14066, X 2.20.17). On the *Ordo* here, Litewski, *Zivilprozeß*, 407–08, and nn. 790, 798.

397 Mausen, *Veritatis adiutor*, 503 and n. 425, noting Dig. 22.5.3§5, received by Gratian at C 4 q. 2/3 c. 3§3.

398 The *Ordo Bambergensis* places it in the first person. See Mausen, *Veritatis adiutor*, 323 and n. 146. On judicial torture in the *ius commune*, though without consideration of the *ordines*, Virpi Mäkinen and Heikki Pihlajamäki, “The Individualization of Crime in Medieval Canon Law,” *Journal of the History of Ideas* 64.4 (2004): 538–39. For our treatise here, Litewski, *Zivilprozeß*, 380.

399 Nothing in this lengthy canon speaks directly to the treatise’s argument here, which is perhaps not surprising given its reference to torture.

400 Compare the *Summa Simonis*, ad C 3 q. 9 c. 16, s.v. *Nichilominus quoque*. Nota quod falsus testis tripliciter peccat et ideo triplex pena ei infligitur. Peccat enim in Deum qui est ueritas. Vnde punitur septem annorum penitentia, ut infra C.vi. q.i. Quicumque. Peccat contra iudicem cuius presentiam deludit, propter quod fit infamis et semper remanet intestabilis, ut infra C.xxii. q.v. Si quis conuictus. Peccat etiam in proximum cui nocet dum mendacio ueritatem mutat et propter hoc talionem debet pati, ut hic dicitur et Bur. lib. xvi. c. Falsus testis et infra C.xxxiii q.ult. Hec imago. On this threefold distinction in the *Ordo Bambergensis*, something not found in the other works examined in this study, Litewski, *Zivilprozeß*, 404 n. 741.

401 The roots of this text lie in Prov. 19.9. It was widely transmitted by patristic and early-medieval authors, including Burchard, *Decretum* 16.5 and, closer to the time of our *ordo*, by Bartholomew of Exeter. See Adrian Morey, Bartholomew of Exeter, *Bishop and Canonist. A Study in the Twelfth Century* (Cambridge: Cambridge University Press, 1937), 259.29–32. It was eventually received at X 5.20.1. Mausen, *Veritatis adiutor*, 756 and n. 16, notes that our *Ordo* is the first to use it in this procedural context; he also compares various decretist works, among them Huguccio’s *Summa*.

402 That infamy bars testimony here, Mausen, *Veritatis adiutor*, 487–88 and n. 368. Compare also the *De edendo*.

403 Mausen, *Veritatis adiutor*, 754 and n. 11.

testified he is then denied the opportunity to produce further witnesses, unless to disprove his adversary's depositions.⁴⁰⁴ Concerning this point, however, the truth of legal experts is an opinion rent into heresies and schisms. Also, testimonies given in the presence of both parties can be done without prejudice towards subsequent production of witnesses, as in Cod. 4.21.18.⁴⁰⁵ It must also be noted that the statements of the witnesses should be interpreted benevolently,⁴⁰⁶ so they not appear cited concerning the charge of perjury, as in *Extrav. Cum tu fili praeposito*.⁴⁰⁷

Concerning Proofs⁴⁰⁸ (Cap. xvi)

Proof of a doubtful matter⁴⁰⁹ is confession of liability made through arguments.⁴¹⁰ The one making the charge should prove, not the one denying.⁴¹¹ As the Master (Gratian) relates, it is the nature of things, a legal custom, that the fact of denying is no proof,⁴¹² as in C 6 q. 5 c. 1 and C 6 q. 5 d.p.c. 1.⁴¹³ I do not say that he cannot prove, only that he is not compelled to do so.⁴¹⁴ It was instituted that the burden of proof is the duty of the plaintiff, from whom the suits come, not the defendant, as

404 Nov. 90 c. 4. On the *De edendo* here, Mausen, *Veritatis adiutor*, 668 and n. 220.

405 Kaser, *Zivilprozeßrecht*, 604 n. 56, 606 n. 72, also Mausen, *Veritatis adiutor*, 47 and n. 62. Note that there is no direct reference, however, in the *Ordo*'s source. Again, the treatise extends its source. On *productio* in the *De edendo*, see chapter 3 and, generally, Nörr, *Prozessrecht*, 132, also Litewski, *Zivilprozeß*, 399 n. 663, noting also *Olim edebatur actio* §397.

406 On *benigne* in classical law, Berger, *Encyclopedic Dictionary*, 373, noting its relationship to equity, *aequitas*.

407 Pope Alexander III (JL 13894, x 2.20.16). See Nörr, *Zur Stellung*, 33 and n. 21.

408 On varying types of proof, with reference also to the *Ordo Bambergensis*, Lévy, *La Hiérarchie*, 24–25 and n. 12 and, on this passage here, Litewski, *Zivilprozeß*, 365.

409 On *res dubiae*, Berger, *Encyclopedic Dictionary*, 677.

410 Comparing the *Ordo Bambergensis* here with other definitions, Litewski, *Zivilprozeß*, 354.

411 Dig. 22.3.2. Compare both Bulgarus and the *De edendo*.

412 Compare above, chapter 3, for the *De edendo*'s reference to Placentinus' *Summa* on Cod. 4.19.23: Imperatores Diocletianus, Maximianus. Actor quod adseverat probare se non posse profitendo reum necessitate monstrandi contrarium non adstringit, cum per rerum naturam factum negantis probatio nulla sit. Note also Bulgarus and Litewski, *Zivilprozeß*, 354 n. 17.

413 Litewski, *Zivilprozeß*, 430 n. 1100, also cap. xx below in the *Ordo*.

414 Litewski, *Zivilprozeß*, 363.

stated in the aforementioned text (C 6 q. 5 c. 1 and d.p.c. 1.)⁴¹⁵ Nevertheless, sometimes it is customary that the defendant is able to prove, as in C 29 q. 2 c. 6; at other times, the burden of proof is necessarily transferred from the plaintiff to the defendant, as in C 33 q. 1 c. 3. Therefore, it is said that proof is incumbent upon the one speaking, not the one denying; but you should understand this means if they are of equal condition, that is one may not be believed or presumed more than the other, as said elsewhere in C 11 q. 1 c. 15.⁴¹⁶ The plaintiff follows the court of the defendant, not the defendant the court of the plaintiff,⁴¹⁷ unless on behalf of the plaintiff there be a *res litigiosa* or a delict⁴¹⁸ against the defendant as in C 6 q. 2 c. 1⁴¹⁹ and C 4 q. 5 c. 1.⁴²⁰ Sometimes the defendant is compelled to prove, for example, if you raise an exception, or if he does something else when himself acting as plaintiff, as in D 54 c. 10.⁴²¹ When the plaintiff fails to prove, the defendant, even if he has said nothing in his defense, shall win as in C 6 q. *aliter accusator*.⁴²² It must be proved to the judge, not to the opponent, as in C 35 q. 6 c. 8⁴²³ and C 35 q. 6 c. 7. Again, arguments prove this: certain ones suffice,⁴²⁴ others are advantageous.⁴²⁵

-
- 415 Compare also Cod. 4.19.20. See, in general, Kaser, *Zivilprozeßrecht*, 483 n. 1, 491 n. 57 and, especially, 493 n. 66.
- 416 On this and related canons in Gratian, Helmholtz, *The Ius Commune*, 198.
- 417 Cod. 3.13.2 and Cod. 3.19.3. Compare the *De edendo* on the maxim *actor forum rei sequi debet*.
- 418 In the classical law, this was an action brought by a private person who sought a monetary settlement. See Berger, *Encyclopedic Dictionary*, 430.
- 419 Neither Rufinus, Stephen of Tournai, the *Summa Simmonis*, nor *Summa Lipsiensis* mention the *res litigiosa* in commenting on this canon.
- 420 Again the decretist *summae* consulted do not mention the *res litigiosa* when commenting on this canon.
- 421 The connection to the texts seems remote. The canon treats the situation of a slave/serf made a cleric. On the distinction between *pro actore* and *pro reo* in the classical law, Richard William Leage, *Roman Private Law: Founded on the 'Institutes' of Gaius and Justinian* (London and New York: Macmilland and Company, 1906), 371–72.
- 422 The citation is uncertain. Compare Placentinus, *Summa Codicis*, 2.1.4: . . . quod enim alias dicitur actore non probante reus debet obtinere, non dicitur accusatore non probante. Even closer to the *Ordo Bambergensis*: William of Cabriano, *Casus Codicis*, 2.1.4: . . . enim actore in probatione deficiente reus, etsi nihil prestiterit, obtinebit.
- 423 See also Litewski, *Zivilprozeß*, 366 n. 165, that proof is made to the judge alone.
- 424 On sufficient proof, noting also *Olim edebatur actio* §268–269, Litewski, *Zivilprozeß*, 369 n. 213.
- 425 On this point, Lévy, *La Hiérarchie*, 107 and n. 2, noting Bassianus, *Libellus* §368, 369 along with the *Ordo Bambergensis*.

Witnesses in legitimate number are not rejected, as in C 15 q. 5 c. 2,⁴²⁶ nor public documents correctly made, as in C 25 q. 2;⁴²⁷ likewise private documents written and signed to one's own prejudice,⁴²⁸ as in C 27 q. 1 c. 36 and C 20 q. 1 c. 16, which in civil law are called *apocha*⁴²⁹ and *antapocha*.⁴³⁰ Private statements and notes,⁴³¹ in which one either does not say he was owed anything or the witness did not vow that something is or is not owed, help but do not suffice.⁴³² Then, indeed, it damages the sons who are inheriting, for sons are not allowed to sue against the judgment of their guardian, as in C 11 q. 1 c. 13. Likewise, it is believed that what the testator spoke or vowed is what the heir, 'who is the other self,' had said or vowed.⁴³³

426 The last sentence of this canon connects with the exposition. For its implications concerning the concept of innocent until proven guilty, Richard M. Fraher, "Ut nullus describatur reus prius quam convincatur: Presumption of Innocence in Medieval Canon Law?," in *Proceedings Berkeley*, 498–99. Fraher considers several decretist commentators but none of the *ordines*. See also Helmholz, *The Ius Commune*, 113.

427 Compare, for example, Müller, *Päpstliche Delegationsgerichtsbarkeit*, 2.201, concerning an act of 1192 reporting a decision made by three judges-delegate. It notes 'ex publicorum instrumentorum inspectione facti nobis.' On 'public instruments' in the earlier Middle Ages, for example the *pancarte*, which gave blanket confirmation to private agreements, Marios Costambeys, "The Laity, the Clergy, the Scribes and their Archives: The Documentary Record of Eighth-and Ninth-Century Italy," in *Documentary Culture and the Laity*, 248.

428 Instrumenta privata in proprium praeiudicium emissa. See, in general, Nörr, *Prozessrecht*, 154–55, also Lévy, *La Hiérarchie*, 110 n. 14, also noting Bassianus, *Libellus* §368, and Litewski, *Zivilprozeß*, 420 n. 957 and 422. Our treatise pays particular attention to private instruments.

429 For *apocha*, Berger, *Encyclopedic Dictionary*, 364. This was a receipt valid only for 30 days after reception. The creditor used it to declare that the sum he received was correct. See Nörr, *Prozessrecht*, 157.

430 On *antapocha*, a counter-receipt, Souter, *Glossary of Later Latin*, 17.

431 As Berger, *Encyclopedic Dictionary*, 350 notes, the *adnotatio* in the classical law was a 'decision of the emperor written in the margin of a petition addressed to him.' Perhaps this technical meaning is intended here, though it seems more probable that a written remark is meant. On *privatae attestaciones*, Litewski, *Zivilprozeß*, 370 n. 224 and, for this passage in the treatise, 423 and n. 1003, discussing *privatae annotations* as private notes promising to pay a creditor.

432 Comparing here *Olim edebatur actio* §423–425, Litewski, *Zivilprozeß*, 424 and n. 1019. The private instruments provide some proof, but cannot be decisive. That oral testimony was judged of better worth than documents, Wickham, *Courts and Conflict*, 132.

433 I have not found a prior example of this phrase, which subsequently became a maxim in the Common Law as *haeres est alter ipse et filius est pars patris*, for example in Coke's

Presumptions concerning, for example, a single witness and reputation,⁴³⁴ are also useful but are not (by themselves) sufficient,⁴³⁵ as in C 35 q. 6 c. 4⁴³⁶ and D 86 c. 24. Nevertheless, sometimes a sentence may come from presumption alone, as in D 54 c. 15, C 11 q. 1 c. 25. Thus, the sentence is given either through proof, by documents and witnesses, or because of presumptions. Sometimes it is given through agreement concerning reputation,⁴³⁷ as in C 3 §Item,⁴³⁸ or justified suspicion, C 32 q. 1,⁴³⁹ or only from what is evident to the judge, as in C 3 q. 2 c. 9. Again, we must know that proof defeats presumption.⁴⁴⁰ For example, if anyone hears some case ‘extraordinarily,’⁴⁴¹ we presume he heard it. If the contrary were proved, presumption is eliminated, as in C 35 q. 3 c. 11.⁴⁴² Presumption is also eliminated by a contrary presumption, as when we see someone living in religion we presume him to be good; if, however,

Institutes, 3, 12b, cited in Henry Campbell Black, *A Law Dictionary*, 2nd ed. (St. Paul: 1910, rp. 1995), 558.

- 434 On reputation, *fama*, here Litewski, *Zivilprozeß*, 443 n. 1277, comparing also *Olim edebatur actio* §363, also Mausen, *Veritatis adiutor*, 687, and n. 33 noting Dig. 29.3.1. Public fame could play a crucial role in cases, on which see Wickham, *Courts and Conflict*, 90–91.
- 435 See Cod. 4.20.9§1. On the refusal of testimony from a single witness, Mausen, *Veritatis adiutor*, 682–83 and n. 6. The *Ordo*’s extended treatment of presumption beginning here is one of its most distinguishing features. On presumption, in addition to its treatment in earlier chapters, for example chapter 2, and the burden of proof, Helmholz, *The Spirit*, 156–57 and, for Placentinus’ influence on the *ordines*, Gouron, “Unus testis,” 88–89. See also Lévy, *La Hiérarchie*, 115 and n. 40. As seen above in chapter two, however, Bulgarus did discuss burden of proof, on which see also Litewski, *Zivilprozeß*, 439–40 and n. 1238, noting Placentinus and, for the canon law, Rufinus and Stephen of Tournai.
- 436 Here is an example where presumption might be considered. Compare also Placentinus, *Summa Codicis*, 4.19 and 20. See also Gouron, “Testis unus,” 88 and n. 30, noting various *ordines*, though not the *Ordo Bambergensis*.
- 437 On these, Litewski, *Zivilprozeß*, 371.
- 438 Possibly C 3 q. 7 d.p.c. 7.
- 439 Possibly C 32 q. 4 c. 3.
- 440 *Probatio vincit praesumptionem*: later a widespread maxim. Lévy, *La Hiérarchie*, 107 notes, along with our treatise, Placentinus, *Summa Codicis*, 4.19. See Litewski, *Zivilprozeß*, 429 and n. 1220, also 443 and n. 1274.
- 441 On the *cognitio extra ordinem*, see the Introduction, also Berger, *Encyclopedic Dictionary*, 394 and William Turpin, “Formula, *Cognitio*, and Proceedings *Extra Ordinem*,” at <http://local.droit.ulg.ac.be/sa/rida/file/1999/TURPIN.pdf> accessed on 1 April 2014.
- 442 The canon treats ‘nocturnal emissions’ and the question of whether they are natural or intentional. A factor is whether they are frequent, which could be extended to presumption.

we see him lapsed into heresy, there is presumption to the contrary.⁴⁴³ The burden of proof is transferred from plaintiff to defendant, sometimes on account of delict, sometimes because of personal privilege, or because of the remedy of presumption.

Concerning Judgments and Judges (Cap. xvii)

Judgment is called a threefold act by three persons contesting before the judge.⁴⁴⁴ To judge the case in the most holy way, the most sacred Gospel books should be placed in their midst, so that the judges may rule with greater certainty and the absence of the contumacious, considered as present, may be filled with the presence of God.⁴⁴⁵ Though, indeed, God is everywhere, nevertheless He is considered even more present when His Gospels have been placed before all. It is fitting that the judge be of sound character, of free status, not a woman,⁴⁴⁶ older than the age of twenty, and not a child, as in C 3 q. 7 c. 1.⁴⁴⁷ Certain people are prevented by nature from being a judge, others by the law, and still others by customs. The last, as in C 3 q. 7 d.p.c. 1, is not as if they lacked judgment but, instead, since it has been received by custom that they do not perform civil offices.⁴⁴⁸ It must be noted that if a serf had declared a sentence

443 Compare the discussion of the maxim *habitus non facit monachus* (the habit does not make the monk) treated by Dannenberg, *Das Recht der Religiösen*, 260–67.

444 Comparing our treatise here with Bulgarus, Nörr, *Zur Stellung*, 8 and n. 5, citing also Kuttner and Rathbone, “Anglo-Norman,” 290.

445 Cod. 3.1.13.4. In general, Schlinker, *Litis contestatio*, 210 n. 471, though without treating the *Ordo Bambergensis*.

446 In general, Metz, “La Femme en droit canonique,” 103–05 also, for the prohibitions here, some shared with Bulgarus, Litewski, *Zivilprozeß*, 104–05.

447 In general, Brundage, *Medieval Origins*, 173 also with discussion of its sources in Roman law. Most of what the *ordo* states is not in the text cited from Gratian. On the status of children in Gratian, Jessica Goldberg, “The Legal Persona of the Child in Gratian’s *Decretum*,” *BMCL NS* 24 (2000): 1–53.

448 The *dictum* is partially derived from Dig. 5.1.12.2. For recent consideration of the classical text, Tiziana J. Chiusi, “‘Fama’ and ‘Infamia’ in the Roman Legal System. The Cases of Afrania and Lucretia,” in *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry*, ed. Andrew Burrows, et al., (Oxford: Oxford University Press, 2013), 150. On Gratian, Brundage, *Medieval Origins*, 143 n. 58, discussing various commentators, for example Huguccio of Pisa, who takes into account the Old Testament model of Deborah as a judge. See also Litewski, *Zivilprozeß*, 475, comparing the treatise with the *De edendo* and Bulgarus.

from delegation while considered a free man, it still obtains the firmness of a legal judgment even if he were subsequently driven into servitude,⁴⁴⁹ as in C 3 q. 7, same paragraph(C 3 q. 7 d.p.c. 1.).⁴⁵⁰

Let judges know that they judge others no more than they themselves are judged, since judgment is more terrible towards them than to the litigating parties.⁴⁵¹ With God as witness, judges provide decisions for men's disputes. For it pertains to their office to consider the cases of both God and man with frequent regard and to weigh them absolutely with an equal scale balanced by the hand of equity.⁴⁵² It must be known that if a judge is not held liable for a crime, he is able to condemn the accused in any way, unless the church, having been deceived, had convicted an innocent man. Then, the judge is not able to judge him legally and with due office until he is restored. However, if the judge is bound by a crime and, nevertheless, is supported by the church, he is able to judge from the duty of his office, but not from the merit of his life or permission of the law.⁴⁵³ All the canons in C 3 q. 7 speak to this, save for the last.⁴⁵⁴ If he was cited by the church for a crime, then no power of judging is reserved to him unless from our legal ability (residing in the office of judge).

Again, he ought to judge according to things alleged in court, not according to the movement of his own spirit.⁴⁵⁵ The good judge does nothing from his own judgment but, instead, declares the laws according

449 The meaning and extent of the *res iudicata* did not just concern jurists, as evidenced by a case from 1176 discussed by Helmholz, *The Canon Law*, 126 and n. 176. On discussion of the *res iudicata* by Bolognese decretists, Herbert Kalb, "Rechtskraft und ihre Durchbrechungen im Spannungsfeld von kanonistischem und theologischem Diskurs (Rufinus-Stephan von Tournai-Johannes Faventinus)," in *Grundlagen des Rechts*, 411–12.

450 Compare also Cod. 7.45.2.

451 Cod. 3.1.14.2.

452 This passage shows the influence of the prologue to Placentinus, *Quaestiones de iuris subtilitatibus*, 718. See also Ernst Kantorowicz, *The King's Two Bodies*, 107–08 and n. 60 and Hermann Kantorowicz, *Studies*, 181–205 and "Placentinus and his *Sermo de Legibus*," 22.

453 Reflection on the judge's office, his personal merit, and the 'permission of the law,' is unique among the *ordines* considered in this study.

454 C 3 q. 7 treats ecclesiastical judges legally burdened in some way, for example by infamy.

455 Nörr, *Zur Stellung*, 54 for discussion of our treatise, noting its agreement at this point with the decretist commentaries *Tractaturus Magister* and *Et est sciendum*. See also Litewski, *Zivilprozeß*, 467.

to the laws themselves, as in C 3 q. 7 c. 4.⁴⁵⁶ However, on this point, learned opinion varies. Some consider indeed that the guilty ought to be absolved⁴⁵⁷ according to what was alleged in court, and the judge allows a guilty man to merit those things the judge himself does not know; however, the judge may not go against the sentence, that is, against what he ought to do according to the law, as in C 23 q. 5 c. 41, and C 33 q. 2 c. 18. Accordingly, they say that this text obtains in a judgment of absolution, not condemnation.⁴⁵⁸ Others say that it ought to be referred to a superior judge. Still others declare it thus should be done in a civil case (a criminal one) where the judge purges the province of evil men to punish and drive them away.⁴⁵⁹ This is so if they were subject to him, for he shall be able to expel but not punish foreigners, as in C 23 q. 4 c. 7, unless they perhaps willingly submitted to his jurisdiction, as in C 11 q. 1 c. 39 and C 11 q. 1 c. 46, or, again, if the man broke the law in that province, as in C 3 q. 6 c. 1 and C 6 q. 3 c. 4 and C 6 q. 3 c. 5.

The judge must also take care to be readily available, yet not allow himself to be treated with contempt or permit subordinates to be excessively familiar with him. For contempt against dignity arises equally from manner of life.⁴⁶⁰ He ought not judge ardently against those he considers evil nor, on the other hand, is it fitting that he wail with clamorous

456 On this canon, Matthias Schmoeckel, *Humanität und Staatsraison. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinsamen Strafprozeß- und Beweisrechts seit dem hohen Mittelalter* (Vienna: Böhlau, 2000), 192. On the argument here, Gouron, "Jean Bassien," 134 and n. 19 noting research by Nörr on connections here with Johannes Bassianus, the canonistic *Summa Coloniensis*, and Placentinus.

457 Litewski, *Zivilprozeß*, 467 and n. 230–231, without, however, commenting on who these might be. An example of this view comes from the *Dissensiones dominorum*, 1, additions, 237 cited by Whitman, *Origins of Reasonable Doubt*, 241 n. 70: Queritur an secundum conscientiam, vel potius secundum allegata iudicare debeat. Solutio: Ultimus questionis articulus non multum habet dubietatis. Solvendum enim puto nocentem, secundum quod allegatum est a parte sua, si nulla vel minus frivola contra ipsum allegantur. Et facio contra conscientiam, idest contra id quod scio me facere debere. See also for our treatise here, Nörr, *Zur Stellung*, 52 and n. 4.

458 On this distinction in the later ordinary gloss to the *Liber Extra*, see Schlinker, *Litis Contestatio*, 174.

459 Dig. 1.18.3.

460 Dig. 1.18.19pr. Compare also John of Salisbury, *Politicraticus*, c. 15.4, accessed at http://www.monumenta.ch/latein/text.php?tabelle=Ioannes_Saresberiensis&rumpfid=Ioannes%20Saresberiensis,%20Polycraticus,%205&level=&domain=&lang=o&links=&inframe=1&PHPSESSID=84d5fia6egazb6d5aef4c354bc4b5c2 on 25 June 2012.

prayers,⁴⁶¹ as in C 23 q. 4 c. 33. A judge is neither constant nor upright whose face betrays the emotion of his spirit.⁴⁶² When sentencing, judges should not be led headlong by anger or fury, as in C 11 q. 3 c. 70, and it is fitting that the one judging examines carefully all matters in the case, as in C 30 q. 5 c. 11.⁴⁶³

One must understand that the judge is not permitted to sell justice nor the witness his testimony, although the advocate may be allowed to sell his valid legal assistance and the jurisconsult, correct legal counsel, as in C 11 q. 3 n. 71 and C 14 q. 5 c. 15.⁴⁶⁴ The reason for the difference is that witness and judge are consulted by both parties, while the others, advocate and jurisconsult, fall to one party or the other.⁴⁶⁵ Indeed, whoever does not rightly judge and expects remuneration commits fraud against God since, by accepting money, he sells justice, which ought to be freely given,⁴⁶⁶ as in C 11 q. 3 c. 66.

However, it is asked: is it simony to sell justice? It seems so, since justice is a virtue and numbered among the spiritual gifts, and thus it seems he commits simony who wishes to sell it, as in C 1 q. 3 c. 10.⁴⁶⁷ Some say, however, though selling justice is a sin, it is nevertheless not simony.⁴⁶⁸ Simony is committed when something spiritual is sold, in which the grace of the Holy Spirit is given, since, though the sacrament of marriage

461 Nec precibus calamitatoris in edition. Von Schulte, *Der Ordo*, 33 n. 1 wonders whether the text might be a copyist's error for *calamitosis*.

462 Dig. 1.18.19.1. For the civil law, Kaser, *Zivilprozeßrecht*, 499 n. 45. Compare also Gilbert Foliot to Bishop Richard of London, (Ep. 113, from 1153–1161), on which see Morey and Brooke, *Letters and Charters*, 155 and Taliodorus, "Law and Theology," 88 and n. 73.

463 Comparing the *Ordo*'s use of this canon from Gratian with other, contemporary decretists, including Huguccio, Müller, *Huguccio*, 188.

464 On advocates' compensation, 'selling justice,' in general, Brundage, *Medieval Origins*, 192–93.

465 On this discussion of conflicts of interest by Gratian and the decretists, Brundage, *Medieval Origins*, 187.

466 Litewski, *Zivilprozeß*, 473 and n. 334, comparing also Bulgarus and *Olim edebatur actio*, §661, 686.

467 Brundage, *Medieval Origins*, 389 and n. 59 for the earlier, pre-Gratian canon law on this, and 183 and n. 52, noting that the contemporary canonist, Honorius, argued that 'giving legal assistance in an unjust case' was like simony. Compare also Honorius, *Summa De iure canonico tractaturus*, 'on C 1 q. 3 c. 10.

468 See Brundage *Medieval Origins*, 194–95, and n. 97 noting that both Rufinus and Stephan of Tournai (respectively in commentaries on C 15 q. 2pr and C 14 q. 2), among other Bolognese decretists, took this position, namely that it was not simony.

is spiritual, nevertheless no grace is conferred in marriage itself,⁴⁶⁹ and thus to sell or buy it is not simony, as in C 32 q. 2 c. 13.⁴⁷⁰

If a judge judged with evil intent, he makes himself liable to judgment, and reclaiming is awarded to the one who has given the money, as in C 14 q. 5 c. 15.⁴⁷¹ However, if someone gave money to the judge so that he would judge well or not judge wrongly then, in this case, since only the judge who accepted the money did something disgraceful, the donor is able to reclaim, as in the aforementioned chapter⁴⁷² and c. *enimvero*.⁴⁷³ If someone gave money to the judge so that he might judge well or wrongly, since both the giver and receiver did this shameful thing, the donor is not able to reclaim, as in C 14 q. 5 c. 1.⁴⁷⁴ All things being equal, the condition of the possessor is better, as in C 33 q. 5 c. 1.⁴⁷⁵ Though the donor cannot reclaim, by general rule the fisc shall be able to revoke from the one who received his money. If, however, a judge impertinently judges wrongly, he shall be punished as seems equitable to the one judging him, as in C 24 q. 3 c. 6.

469 Compare the *Summa Simonis ad C* 11 q. 3 c. 6: Qui recte usque uendit. Hic queritur an iustitiam uendere sit simoniacum, quod quibusdam uidetur. Cum enim iustitia uirtus sit et inter prima spiritualia computetur, manifeste uidetur simoniam committere qui iustitiam uendit, ut supra C.i. q.iii. In templo. Alii dicunt quod licet sit peccatum, simoniacum non est. Ibi enim tantum simonia committitur ubi illud spirituale uenditur in quo Spiritus Sancti gratia fertur. Nam licet sacramentum coniugii sit spirituale, quia cum in matrimonio nulla gratia confertur, ut C xxxii. q. ii.

470 On this canon in Gratian, Brundage, *Law, Sex, and Christian Society*, 355 n. 15. Unlike our treatise, the *Summa Simonis* does not make a comparison with simony: Hinc habes quod parentibus puelle dari potest pecunia ut consentiant in matrimonium.

471 See, in general, Brundage, *Medieval Origins*, 193 n. 90. On *repetitio*, Berger, *Encyclopedic Dictionary*, 675 and the discussion in earlier chapters of this study.

472 C 14 q. 5 c. 15.

473 Placentinus, *Summa Codicis* 7.52: Idem si dederit pecuniam, ut bene iudicet. Enimuero si quis iudici pecuniam dederit, ut non iudicet, uel ut male iudicet, is qui dedit non repetit: quia ipse (sicut et qui accipit) turpiter agit, et in pari causa potior est conditio possidentis, uerum licet is qui dedit non possit repetere: qui eadem laborat turpitudine, forte fiscus ex generali regula ab indigno poterit auocare. Compare also C 14 q. 5 c. 15: §1.

474 Unlike the *De edendo* and the *Practica legum*, our treatise treats usury.

475 On this canon, Brundage, *Law, Sex, and Christian Society*, 242, 283. Compare also the *Summa Stephani*, C 1 q. 3 c. 2 s.v. *rationis ergo*: Videtur innuere, quod, qui aliquid accepit ex venditione spiritualium, ei, a quo accepit, debeat restituere. Sed cum uterque sit in pari causa turpitudinis, qui dedit non poterit repetere; quoniam in turpi causa melior est conditio possidentis.

The judgment is made by the sitting judge, who hears, questions, cites, makes interlocutory statements,⁴⁷⁶ gives favor, makes decisions, grants stays. Judgment is also set forth by the plaintiff accusing, claiming, and refuting counter-arguments. For the defendant, it is by confessing, denying, and by raising exceptions.⁴⁷⁷ Thereafter, in every judgment four persons are needed: the judge, armed with the helmet of justice; the plaintiff, with the dagger of malice; the witness, with the trumpet of truth; the defendant, with the shield of defense,⁴⁷⁸ as in C 4 q. 3 c. 1 and C 4 q. 3 c. 2.⁴⁷⁹ The accuser rightly does not come from the household of the judge, as in C 4 q. 4 c. 3.⁴⁸⁰ It must also be known that in civil, but not criminal, cases the son is able to judge the father and the father, the son,⁴⁸¹ as C 4 q. 7 c. *infames*.⁴⁸²

We have sufficiently described the judge's office, having paid attention to that title concerning the citing of those contumaciously absent. It must also not be overlooked that not only enemies of the defendant but also those deemed suspect by him are removed from the judgment.⁴⁸³ The defendant shall be able to refute in writing⁴⁸⁴ not only judges assigned to them but also their ordinaries,⁴⁸⁵ as is evident from C 5 q. ult,⁴⁸⁶ but only to the extent he requests judgment from his own superiors and not from other ordinary judges, which is clearly taught by

476 In general, Nörr, *Prozessrecht*, 193.

477 As Nörr, *Zur Stellung des Richters*, 11 notes, this passage clearly betrays the influence of Placentinus, *Summa Codicis*, 3.1.

478 These images go back at least as far as Alcuin of York, *De rhetorica*, PL 101.929C, and was also used by other twelfth-century authors, for example the decretist Sicard of Cremona and the anonymous German author of the earlier *ordo*, *De rhetorica ecclesiastica*. See Mausen, "Pugio malignitatis," 9–10 nn. 1, 2. Compare Eph. 6: 11–17.

479 See also C 4 q. 4 c. 1.

480 C 4 q. 4 c. 3, also C 4 q. 2/3 c. 1. For the civil law, compare Dig. 48.18.1.3.

481 Dig. 5.1.77. See Litewski, *Zivilprozeß*, 106 and n. 425, comparing the *De edendo*.

482 Edition gives C 4 q. 7 *infames*. There is no *quaestio* 7 for this *causa*. Perhaps C 3 q. 7 c. 2: §18 is meant.

483 Litewski, *Zivilprozeß*, 110–11 and n. 481, comparing *Practica legum*, cap. 17.

484 On *refutare*, Berger, *Encyclopedic Dictionary*, 671.

485 Comparing also the *De edendo* and *Practica legum*, cap. 17, Litewski, *Zivilprozeß*, 106–08, also n. 450, 453 on the recusal of both the ordinary and delegated judge. The recusal of the ordinary judge is also treated by other *ordines*, but not those considered elsewhere in this study.

486 Perhaps C 3 q. 5 c. 15 is meant. See Brundage, *Medieval Origins*, 384–85, also Litewski, *Zivilprozeß*, 110 n. 473, comparing *Practica legum*, cap. 18, 19.

C 6 q. 3 § *denique*,⁴⁸⁷ because they asserted it was true before the joinder of issue.⁴⁸⁸

Concerning Arbiters (Cap. XVIII)

Some judges, called ordinaries, have their own, proper jurisdiction. Others lack their own jurisdiction, but it has been assigned to them. These are called judges-delegate.⁴⁸⁹ Jurisdiction is the power granted to another, with permission to deliver the law and the ability to establish equity.⁴⁹⁰ For the Roman pontiff and prince alone, jurisdiction is complete;⁴⁹¹ as for others, the remaining judges, it is not complete, ordinary jurisdiction save for those who receive legitimate power from the pope or prince.⁴⁹² Otherwise, it is not ordinary. Sometimes this jurisdiction comes through delegation, rescript, consent of parties, or from compromise.⁴⁹³ According to legal order, the judge is able to delegate initial

487 C 6 q. 3 c. 3.

488 That recusal must take place before the *litis contestatio*, Litewski, *Zivilprozeß*, 112 n. 510, comparing also the *De edendo*.

489 For the distinction here, Litewski, *Zivilprozeß*, 90, also 93, comparing *Olim edebatur actio* §218, 229 and *Practica legum*, cap. 16, 30. Noting that late twelfth-century canonists, particularly the early decretalists, labored to define the church's offices of legate and judge-delegate with civilian terms and concepts, including *iurisdictio mandata*, often giving them their own, distinctive, meaning, Robert Figueira, "Decretalists, Medieval Papal Legation, and the Roman Law of Offices and Jurisdiction," *Res publica litterarum* 9 (1986) 110–35, especially 128–29, noting that commentators on papal decretals increasingly divided legates and judges-delegate accordingly: "legates combined aspects of all three Roman jurisdiction types (ordinary, mandated, and delegated);" delegated judges retained only the mandate for a specific case.

490 The treatise follows Placentinus, *Summa Codicis*, 3.13.3: *Iurisdictio est potestas alicui a publico indulta cum licentia reddendi iuris, et facultate statuendae aequitatis. Haec est alias plena, alias non plena, non plena alias est ordinaria, alias non ordinaria, ut in praesidibus et proconsulibus prouinciarum. Haec alias per delegationem, alias per praescriptionem, alias ex consensu partium ab alio iudice praeterquam a principe. See Litewski, *Zivilprozeß*, 471 n. 297, comparing Bulgarus on equity, also 88 nn. 141, 143, noting the *Ordo Bambergensis*' lack of consistency when, elsewhere, it grants jurisdiction to the arbiter.*

491 On *plena iurisdictio* here, Litewski, *Zivilprozeß*, 83 and n. 68, also 89.

492 On subdelegation and appeal, Figueira, "Subdelegation by Papal Legates," 65–66.

493 On the fourfold distinction here, unique among the *ordines* treated in this study, Litewski, *Zivilprozeß*, 89–90.

jurisdiction to those who hold it from the Roman pontiff or the prince. Accordingly, it is fitting that the sitting judge is in some ordinary power. Jurisdiction is delegated by the pope or prince through rescript, as we frequently see happens through the rescript of the supreme patriarch.⁴⁹⁴ Also, by their own consent, two or more parties choose a judge who sometimes proves suitable to them and sometimes not, as in C 3 q. 6 c. 3, where it is said 'let him who is compelled to be before a judge not his own be silent if he wishes; if he wishes, let him respond.'⁴⁹⁵ Through willing consent, one thus is able to choose a judge he deems suitable, from whose judgment he is not allowed to withdraw after the joinder of issue, as in C 3 q. 5 c. 15. This is so if the litigants consented elsewhere to the ordinary judge. The consent of private persons by no reason is able to make that judge who otherwise possesses no jurisdiction.⁴⁹⁶

A judge called an arbiter is also constituted by the compromise of both parties.⁴⁹⁷ He is also not an ordinary judge. Not only is a free man of sound reputation made arbiter without being a judge, but also even someone who is infamous,⁴⁹⁸ but never a serf, as in C 3 q. 7 c. 2.⁴⁹⁹ It is not important whether the arbiter's reputation is intact or ignominious, merely that he is constituted an arbiter, as is declared in the secular laws,⁵⁰⁰ with punishment obligated to each party. Nevertheless, the judgment of the arbiter neither conveys infamy nor produces a true legal decision,⁵⁰¹ unless the parties have subscribed to it or remained silent for forty days, nor does it provide for an appeal. What it does produce is thus

494 Litewski, *Zivilprozeß*, 98, 554.

495 Pulsatus ante non suum iudicem, si velit, taceat, si velit respondeat. Compare C 3 q. 6 c. 3. For connection with the *privilegium fori*, Helmholz, *The Ius Commune*, 214. On multiple parties, Litewski, *Zivilprozeß*, 154 and n. 148, comparing *De edendo* and *Olim edebatur actio* §516.

496 Compare Cod. 3.13.3.

497 On this compromise, and comparing Bulgarus, Litewski, *Zivilprozeß*, 583 and n. 100, and Helmholz, *The Canon Law*, 328, on the frequency of compromise and arbitration, and Wickham, *Courts and Conflict*, 103, on how it was 'a particularly attractive alternative to the expense of interminable papal litigation.' Consider also the Anstey Case discussed earlier in this study.

498 C 3 q. 7 c. 2 §17. See also Bulgarus and Litewski, *Zivilprozeß*, 581 n. 79.

499 C 3 q. 7 c. 2 §19.

500 Dig. 4.8.7pr.

501 This lack of sustained discussion of infamy contrasts with many decretist works, for example, the *Summa Elnonensis* discussed by Fransen, "Colligite Fragmenta," 100–03. Compare also Bulgarus here and Litewski, *Zivilprozeß*, 579–80.

understood: it may be appealed from ordinary arbiters by the privilege of officials in active service;⁵⁰² however, from arbiters, who lack official legal power, it cannot be appealed,⁵⁰³ as in C 2 q. 6 d.p.c. 33,⁵⁰⁴ C 2 q. 6 c. 34, and C 2 q. 6 d.p.c. 36. Whether this decision shines with the truth, let those seek who are excited by such worldly labor.⁵⁰⁵ Nevertheless, our fathers told us otherwise.

We must note C 3 q. 7 c. 2, since the judge is prohibited from undertaking arbitration of the same case he is judging and ordering it submitted to him in arbitration.⁵⁰⁶ If he declares a decision, the penalty must not be carried out.⁵⁰⁷ Today we believe,⁵⁰⁸ however, the arbiter accepts the power, so that the ‘exception of an adjudicated matter’⁵⁰⁹ may be given the defendant who is absolved and, the victorious plaintiff, the execution of the judgment from cause.⁵¹⁰

Concerning Those Having Confessed⁵¹¹ (Cap. XIX)

Those having confessed are considered judged.⁵¹² This is found in C 2 q. 1 c. 1, 2, C 2 q. 5 c. 20,⁵¹³ C 15 q. 8 c. 1, C 15 q. 5 c. 2. However, individual

502 On these privileges, *dignitates ordinariae*, Berger, *Encyclopedic Dictionary*, 612.

503 This agrees with Bulgarus.

504 On this canon in Gratian and comparison with Bulgarus’ discussion of the arbiter in his letter to Haimeric, see chapter 2.

505 Compare the *Summa Simonis*, ad C 3 q. 2 c. 2 s.v. *praesenti decreto*: Quod utrum bene dicatur, arbitrio lectorum inquirendum relinquimus quos huius mundi labor exagitat.

506 Litewski, *Zivilprozeß*, 582 and n. 82, comparing also Bulgarus.

507 C 3 q. 7 c. 2 §. 19 and Dig. 4.8.9.2.

508 Again, the treatise contrasts contemporary practice with the older law. Compare here also the use of *hodie* in the *De edendo*.

509 On the *exceptio rei iudicatae*, Berger, *Encyclopedic Dictionary*, 628 and, for comparison, the *De edendo* above in chapter 3. See also C 3 q. 7 d.p.c. 1.

510 On the *actio iudicati*, Berger, *Encyclopedic Dictionary*, 519.

511 On *confessio*, generally, Nörr, *Prozessrecht*, 78–79.

512 For the classical law, Yan Thomas, “Confessus pro iudicato. L’aveu civil et l’aveu pénal à Rome,” in *L’Aveu, antiquité et moyen-âge: Actes de la Table Ronde* (Rome: École française du Rome, 1986): 89–117, also, comparing here the *De edendo*, Litewski, *Zivilprozeß*, 377 n. 307.

513 The canon treats the ordeal. On the transition from the ordeal, see above in chapter one. For the period treated by our *ordo* and thereafter (including Fourth Lateran), among many studies, Winfried Trusen, “Das Verbot der Gottsurteile und der Inquisitionsprozeß. Zum Wandel des Strafverfahrens unter dem Einfluß des gelehrten Rechts im Spätmittelalter,” in *Sozialer Wandel im Mittelalter. Wahrnehmungsformen, Erklärungsmuster,*

aspects of this subject must now be noted. Indeed, these are serious matters, filled with mysteries and exposed to snares. That those having confessed in the initial proceeding are considered convicted⁵¹⁴ is distinguished in many ways. Indeed, it is thus categorized:⁵¹⁵ if the confession is in the initial proceeding, it obtains; if extra-judicially, not at all.⁵¹⁶ Thus we spoke correctly, since the solemn confession also made extra-judicially sometimes prejudices the suit;⁵¹⁷ for example if a priest or deacon confesses extra-judicially that he sinned before ordination he may only perform the office of, respectively, deacon or subdeacon, as in C 15 q. 8 c. 4. However, if they confessed after ordination that they had sinned, they are suspended for a time from office; thereafter they will rise again through the fruits of penance to their original grades, as in D 82 c. 5. Again, it is said that 'those having confessed in the initial proceeding are considered convicted' should be understood that they freely confessed and not from fear or the violence of torture,⁵¹⁸ as in C 15 q. 6 c. 1,⁵¹⁹ C 32 q. 2 c. 16,⁵²⁰ and C 15 q. 5 c. 2.⁵²¹ Again, he who confesses in the initial proceedings thus prejudices himself if he confesses against himself. If, however, he confesses for himself, he does benefit, as C 15 q. 3 c. 5 and the *dicta* preceding and following.⁵²² Again, one having confessed in the initial proceedings is considered guilty unless he is younger than

Regelungsmechanismen, ed. Jürgen Miethke and Klaus Schreiner (Sigmaringen: Jan Thorbecke, 1994), 242–43 for summary of the key issues but without discussion of the *ordines*.

- 514 On *confessus in iure*, Berger, *Encyclopedic Dictionary*, 406. On this principle of procedure that went back to the XI Tables, Jolowicz, *Historical Introduction*, 185. Compare also the *De edendo*, on which see Litewski, *Zivilprozeß*, 372–73 and n. 252, also 373, noting that no *ordo* required a special form for *confessio*.
- 515 Literally 'rubricated.'
- 516 See Litewski, *Zivilprozeß*, 374 and n. 270, comparing as well *Olim edebatur actio* §591–594.
- 517 On extra-judicial confession, Litewski, *Zivilprozeß*, 378, also noting *Olim edebatur actio*. Compare as well the *appellatio extraiudicialis*, Nörr, *Prozessrecht*, 65 and, more extensively, his essay "Ein Baustein der mittelalterlichen Rechtskirche: Die *Appellatio Extraiudicialis*," in *Studia in honorem*, 463–82, though not considering the *Ordo Bambergensis*.
- 518 This emphasis on voluntary confession appears also in *Olim edebatur actio*, on which see Litewski, *Zivilprozeß*, 375 n. 278.
- 519 On the *Glossa ordinaria*'s discussion of this text in context of the freedom of the will and torture, Schmoeckel, *Humanität und Staatsraison*, 263 n. 539, also Helmholz, *The Ius Commune*, 121.
- 520 Note that, again, our author has selected a canon concerning marriage.
- 521 On testimony gained from torture, with mention of this section in the *Ordo Bambergensis* and comparison with contemporary decretist thought, Fiorelli, *La tortura*, 130, 256–57 and n. 5 and Lévy, *La Hiérarchie*, 55 and n. 8.
- 522 C 15 q. 3 d.a.c. 5, also C 15 q. 3 d.p.c. 5.

puberty,⁵²³ a child or another minor, as in C 20 q. 2 c. 1 and C 20 q. 2 c. 2, which states if children of both sexes entered the monastery and took the monastic profession by word and deed,⁵²⁴ they did not prejudice themselves or their parents for, until a year and a day,⁵²⁵ they are able either to leave or be recalled by their parents, as in C 20 q. 2⁵²⁶ and C 22 q. 5 c. 15. It is customarily said that confession in the initial procedure prejudices the one who confessed, unless some legal remedy is available, for example, if the confession were extorted by fear or through force.⁵²⁷

One must note that confession is made in many ways. One confesses by law, reason, or one's own voice, as in the chapters already noted; (others include) by interpretation,⁵²⁸ through absence, as in C 3 q. 9 c. 10, through reception of religious orders, as in D 27 c. 1 and D 28 c. 4, *priusquam*, and through offering a gift there to confess God.⁵²⁹ Again, it must be understood that confession may not be obtained from witnesses who have not been carefully instructed by the judge concerning the questions in the criminal case. I do not speak here about tortures but, instead, beatings, since the judge was an ecclesiastic,⁵³⁰ as in C 5 q. 5 c. 4⁵³¹ and

523 The status of *pupillus* attracted commentary from other *ordines*. For an extended treatment in a contemporary, German *ordo*, Peter Landau, "Der Traktat 'Lex est commune preceptum' von Altzelle und sein Verfasser—ein Zeugnis gelehrten Rechts aus Deutschland im 12. Jahrhundert," in *Römische Jurisprudenz—Dogmatik, Überlieferung, Rezeption. Festschrift für Detlef Liebs zum 75. Geburtstag*, ed. Karlheinz Muscheler (Berlin: Duncker and Humblot, 2011), 388–90, though there is no apparent congruence with our *Ordo*. See also Metz, "L'enfant," 80.

524 The text reads 'et se esse monachos confessi fuerint.'

525 In general, Dannenberg, *Das Recht der Religiösen*, 170–93.

526 C 32 q. 4 in edition.

527 C 15 q. 6 c. 1.

528 On *interpretatio*, Berger, *Encyclopedic Dictionary*, 513 and Nicholas, *An Introduction to Roman Law*, 28–31.

529 On gift, *munere*, Berger, *Encyclopedic Dictionary*, 589.

530 On canon law, torture, and the beginnings of inquisitorial procedure, among many studies, two essays by Kenneth Pennington, "Torture and Fear," *Rivista internazionale di diritto commune* 19 (2008): 203–42, and "Torture in the *Ius Commune*," in *Mélanges Anne Lefebvre-Teillard*, 813–38, also Schmoeckel, *Humanität und Staatsraison*, 241–51, none referring to our *Ordo*. See, however, Lévy, *La Hiérarchie*, 55 and n. 8, comparing the *Ordo Bambergensis* with decretist commentary. There is also agreement with Rufinus and Stephen of Tournai in their commentaries on C 5 q. 5 c. 4 and also with Johannes Faventinus' treatment of C 15 q. 6.

531 On this canon, related civil law texts, and contemporary decretals, Helmholz, *The Ius Commune*, 117.

C 23 q. 5 c. 1 (at the end);⁵³² it cannot be from the defendant, whose confession of a crime ought to be voluntary, as shown in many texts above.

There are those who say that a confession also sometimes can be extorted from the defendant, as in C 23 q. 5 c. 1⁵³³ and C 14 q. 6 c. 1. In a civil case, however, confession ought not be obtained by torture except from servants, as in C 2 q. 6 c. 30.⁵³⁴ One must not overlook that if someone, fearing torture, had confessed in the initial proceeding and, because of this, was convicted and excommunicated, he is to be admitted to court if he comes within a year to assert his innocence; after a year, let his voice not be heard, as in C 11 q. 3 c. 36.⁵³⁵ Furthermore, certain ones assert that one who confessed in the initial proceeding cannot have recourse to the remedy of appeal,⁵³⁶ as in C 2 q. 1 c. 3 and C 2 q. 6 d.p.c. 41 §1. Indeed, from this it is evident that the correct decision of the judge has been ordered to be executed and, from this fact, it should be clear that there is no appeal for those who confessed before a magistrate.⁵³⁷

Concerning the Swearing of Oaths and Perjury⁵³⁸ (Cap. xx)

One says, however, that an oath is the discrete vow or assertion of truth through God brought as witness.⁵³⁹ Therefore, to swear an oath is nothing

532 Compare also Gilbert Foliot, Ep. 157, 159, both letters to Bishop Roger of Worcester from 1165 on which see Morey and Brooke, *Letters and Charters*, 208–09 and Taliadoros, “Law and Theology.”

533 It is interesting to compare the *Ordo* here with decretist commentary. Rolandus, Rufinus, and the *Summa Simonis* do not discuss gaining a confession from the accused; rather, they focus on the judge’s legitimate punishment, even the death penalty, of the convicted person because he wields, as Rufinus puts it, the ‘power of the sword.’

534 Robinson, *Criminal Law*, 64–65 for the classical law’s discussion of the torturing of slaves.

535 On this canon, Schmoekel, *Humanität und Staatsraison*, 312 and n. 122.

536 For example *Summa Simonis ad C 2 q. 1 c. 3, s.v. sicut usque excusatione*: Ex hoc c. colligitur quod si aliquis in iudicio confessus fuerit, non possit confugere ad appellacionis remedium, ut C. e. q. vi. Si propter.

537 Compare Johannes Faventinus, *Summa ad C 2 q. 1 c. 3*: Hinc patet. Quod confessorum in jure nulla est appellatio. Ex quo enim patet justa iudicis definitio, mandanda est executione, in Bamberg, Can. 37, cited by Friedrich Maassen, *Beiträge zur Geschichte der juristischen Literatur des Mittelalters* (Vienna: K.K. Hof- und Staatsdruckerei, 1857), 28. See also *Summa Stephani, ad C 2 q. 1 c. 3 s.v. nulla*.

538 Helmholz, *The Spirit*, chapter 6 and, for this chapter in the *Ordo*, Litewski, *Zivilprozeß*, 429. Our treatise devotes considerable attention to the question of when the oath is forbidden.

539 Compare, for example, *Summa Rufini, ad C 22*, in princ.: Districte enim dicitur iuramentum discrete assertione veritatis per deum inductum testem. On the classical *iuramentum*

other than to affirm or deny, with God bearing witness.⁵⁴⁰ Accordingly, it is the greatest remedy used to settle disputes,⁵⁴¹ for truly, when the oath is offered, every dispute is ended.⁵⁴² Indeed, the apostle said ‘the conclusion of all disputes is the oath.’⁵⁴³ The oath, however, must not be offered except in dubious or uncertain matters, (as in) C 22 q. 1 c. 5.⁵⁴⁴ It is especially introduced on account of human suspicion. Truly, if one man believed another, it would not be necessary. Since we wish to persuade the weak that is useful for them, and they do not believe the plain word, they are permitted to swear since they do not believe the word alone. When the oath is imposed, they judge it valid. Thus the evil of the oath is from not believing, not from making it, as in C 22 q. 1 c. 14 and C 22 q. 1 c. 5, and many others.

The oath was instituted on account of the sacrilege of the idolatrous.⁵⁴⁵ Just as formerly it was conceded to those under the old covenant to sacrifice offerings to God,⁵⁴⁶ so that they might not sacrifice to idols, thus they were also allowed to swear by God, not that they did this lawfully, but because it is better to offer to God than to demons, as in C 22 q. 1 c. 8.⁵⁴⁷ Indeed, we are forbidden to swear through created things, not because, in the fashion of the pagans we believe that there is some spirit dwelling in them, nor that we hold the created order in contempt by judging things promised through it as worthless, as in C 22 q. 1 d.p.c. 16.

de veritate dicenda, Nörr, *Prozessrecht*, 115, also Lévy, *La Hiérarchie*, 131 and n. 1 and chapter 2 above.

- 540 The definition comes from a gloss attributed to Irnerius: *Iurare autem est deo inspectore. Et teste adhibito aliquid affirmare, uel negare*, on which see Gustav Pescatore, *Die Glossen des Irnerius* (Greifswald: Abel, 1888), 63. It was known by Bolognese decretists as early as the *Summa* of Paucapalea, *ad* C 22 q. 1. *Non enim iuramentum omnino peccatum est: Iurare vero est deo teste vel inspectore adhibito, aliquid affirmare vel negare.*
- 541 Compare here William of Cabriano, *Casus Codicis* on Cod. 2.1.4, s.v. *Qui accusare*: *Est enim maximum remedium diremendarum litium iuramentum, quod tunc quidem a partibus, defertur iudice tamen approbante—nunc vero ab ispo iudice.*
- 542 On the oath settling conflicts, comparing here also *Bulgarus*, the *De edendo*, and *Olim edebatur actio*, §489, Litewski, *Zivilprozeß*, 431 and n. 1108.
- 543 Heb. 6.16. (The edition of our *Ordo* gives *litum* instead of *controversiae*).
- 544 See Litewski, *Zivilprozeß*, 430 n. 1097.
- 545 I have found no other examples of this exegetical/historical reading in the *ordines*.
- 546 Literally, it is ‘sacrifice conceded to youths/the little ones.’ (*sicut etiam olim concessum fuit parvulis, ut hostias deo immolarent, ne eas idolis immolarent.*)
- 547 Compare, for example, other Old Testament practices—for example allowing Deborah to be a judge of Israel—conceded under the old covenant but now rejected under the new. The vow here is thus rather like a form of dispensation. See Litewski, *Zivilprozeß*, 429 and n. 1086 and, generally, Brasington, “Non imitanda set veneranda.”

One swears an oath orally and solemnly,⁵⁴⁸ that is, by touching the Gospels.⁵⁴⁹ But one asks whether he might be less guilty who, vowing by a simple word, perjures by God than through the Gospel?⁵⁵⁰ Indeed, this canon seems to say he is no less guilty: C 22 q. 1 c. 11.⁵⁵¹ If this were so, then all of us today would be criminals and infamous,⁵⁵² since we invariably say 'I swear by God.' This would be monstrous and inappropriate.⁵⁵³ Certain ones thus answer this question by saying that the Church today judges it more terrible to swear repeatedly by God than by the Gospels,⁵⁵⁴ when formerly one seemed more contemptible in transgressing a vow made by placing his hand on the Gospels than by breaking a plain oath to God, as in C 22 q. 1 c. 11. In this case, they say one must understand this as when someone swears on the Gospels without touching them or invoking God. When he does this, then he does no more than one swearing by God. Thus, he is not guilty who vows by created things,⁵⁵⁵ nor one who swears by the Gospels or on relics since,⁵⁵⁶ though he names them, nevertheless he does not actually vow by them for he is not making the oath to them but, instead, to the one to whom the relics were dedicated. Thus the sense would be 'may God, and these relics, so help me,'⁵⁵⁷ that is, 'I desire my salvation from God, to Whom these relics were dedicated.' When someone vows, however, not naming God but some created thing,

548 See Litewski, *Zivilprozeß*, 367, 437, and n. 1207, also Mausen, *Veritatis adiutor*, 78 on the necessity of 'legal solemnity.'

549 In general, G.J.C. Snoek, *Medieval Piety from Relics to the Eucharist. A Process of Mutual Interaction* (Leiden: Brill, 1995), chapter 3. That swearing on relics could be used to authenticate documents, Declercq, "Between Legal Action and Performance," 65.

550 Compare *Summa Rufini ad C 22 q. 1*: *Primum enim quaeritur, utrum minus reus sit qui simpliciter verbo per deum iurans peierat, quam qui per evangelium?*

551 C 22 q. 1 c. 11.

552 This speaks to the prevelance of the oath in medieval procedure. It also demonstrates the tension between the norms of scripture, located in the sacred past, and present practice.

553 Essentially following the *Summa Rufini ad C 22 q. 1*: *Quodsi est, tunc omnes pene hodie criminosi essemus et infames, cum indistincte: per deum iuro, dicamus, quod esset horrendum et inconveniens.*

554 Compare *Summa Rufini ad C 22 q. 1 c. 11*. For a representative example of vowing on the Gospel book, see an act of Bishop Robert Foliot for Gloucester abbey dating 1174–1170: *EEA Hereford*, no. 145, 98–99: *Quod etiam se perpetuo et fideliter observaturum predictus miles tactis sancrosanctis ewangeliis nobis inspicientibus iuravit.*

555 See Helmholz, *The Spirit*, 149–50.

556 Helmholz, *The Spirit*, 151.

557 Patrick J. Geary, *Furta Sacra. Thefts of Relics in the Central Middle Ages*, rev. ed. (Princeton: Princeton University Press, 1990), 37–38, also Snoeck, *Medieval Piety*, 137 and n. 33.

for example the sun and moon,⁵⁵⁸ though the sense could be the same, namely 'I swear through His power, Who created and rules such things,' nevertheless the word is suspect and scandalizes the weak,⁵⁵⁹ and thus we are forbidden to vow this way.

Sometimes one swears an oath extra-judicially, and sometimes in court.⁵⁶⁰ Whenever an extra-judicial oath is offered,⁵⁶¹ it is not a judicial oath⁵⁶² to be given or retendered.⁵⁶³ Nevertheless, offered, renounced, tendered, or entered it offers an advantage. Sometimes the oath is tendered by one party in court with the judge's approval. When tendered, it is normally referred.⁵⁶⁴ This is also the third oath which, on account of the plaintiff's lack of proof is deferred, not referred, by the judge to the

558 Helmholz, *The Spirit*, 151.

559 Compare Romans 14.

560 Berger, *Encyclopedic Dictionary*, 495, noting its incorrect use when referring to the stage of a civil trial before a private judge. The correct phrase was *apud iudicem*.

561 I follow here the translation of *iurisiurandum delatum* by Abel H.J. Greenidge, *Legal Procedure of Cicero's Time* (London: Clarendon, 1901), 258.

562 On the *iurisiurandum necessarium*, Berger, *Encyclopedic Dictionary*, 534, noting also the *iurisiurandum voluntarium* sworn extra-judicially; see also Litewski, *Zivilprozeß* 433 n. 1143, comparing *Olim edebatur actio*, §492.

563 It is interesting to compare Bracton's view on this, on which see John William Salmond, *Essays in Jurisprudence and Legal History* (London: Stevens and Haynes, 1891), 31, accessed at http://archive.org/stream/essaysinjurisproosalmoog/essaysinjurisproosalmoog_djvu.txt on 12 August 2013: 'In connection with the testimony of parties there is a passage in Bracton that deserves some consideration. It is as follows: Item est quoddam sacramentum quod deferitur a parte parti in iudicio vel a iudice parti, in quo nulla sequitur convictio.' The reference is obviously to the decisory oath, or *jusjurandum in iudicio delatum*, of the civil law. By that law a man could not in general testify in his own case. But either party might, if he chose, stake his case upon the oath of his adversary. A party doing this was said to offer the oath, *jusjurandum deferre* to his opponent. If the latter accepted the offer, his oath was absolutely decisive, whether in his own favour or in that of his adversary. Naturally this expedient was seldom or never resorted to except when the party offering the oath was unable to establish his case by any other evidence. As a last resource, he threw himself on the honour or superstition of his adversary.'

564 For the classical law: http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Jusjurandum.html accessed on 12 August 2013: 'This *jusjurandum* which is proposed (*delatum*) in jure, is called *necessarium*, because he to whom it is proposed cannot simply refuse it; he must either take the oath, or, in his turn, propose (*referre*) that the proposer shall take it. Simple refusal was equivalent to *confessio*...' On the *Ordo* here, Litewski, *Zivilprozeß*, 436 and n. 1186.

defendant. The first is conventional or voluntary,⁵⁶⁵ the second, necessary,⁵⁶⁶ the third, judicial.⁵⁶⁷ The last one is not retendered. From the first two, a suit and exception arise, but not from the third.⁵⁶⁸ An oath tendered, but not yet offered, can be revoked; once revoked, however, it ought not subsequently be retendered.⁵⁶⁹ An oath openly tendered by one party in court is either accepted or not. If it is accepted, it is either offered or retendered. What has been retendered is not retendered again. Therefore, the defendant, to whom the oath has been tendered, ought to pay the debt, swear an oath, or retender. The plaintiff ought to desist, swear an oath, or retender. According to Justinian, however, he is permitted to recuse.⁵⁷⁰ That is the fourth part. Certainly, the tendering of swearing an oath shall not appeal, though the one who has been retendered is able to appeal.⁵⁷¹ This is worthy of note, because sometimes the oath has greater, sometimes lesser, authority than does the legal judgment. It has less authority when a minor is being restored against an oath, as in Cod. 2.27.1⁵⁷² and C 31 q. 3 c. 1 and C 27 q. 1 c. 1. It has greater authority because the legal judgment prejudices the truth, which the oath cannot.⁵⁷³ Again, it must be known that it is not rightly retendered to the proctor,⁵⁷⁴ though sometimes he may rightly tender the oath, for example if it were enjoined to him by name or he had to tender the general

565 Lévy, *La Hiérarchie*, 137 and n. 3, noting also Bassianus, *Libellus* §494, also Litewski, *Zivilprozeß*, 432.

566 Jolowicz, *Historical Introduction*, 196 n. 2.

567 On the judicial oath in the classical civil law: http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Jusjurandum.html accessed on 12 August 2013: 'The jusjurandum in iudicio (jusjurandum iudiciale) is required by the iudex, and not by either of the parties, though either of the parties may suggest it. This jusjurandum has not the effect of the jusjurandum in iure; it is merely evidence, and the iudex can give it such probative force as to him seems just. Such an oath is only wanted when other evidence fails.'

568 Litewski, *Zivilprozeß*, 436 n. 1189, noting *Olim edebatur actio* §499 only mentions that an action is not allowed.

569 See Litewski, *Zivilprozeß*, 434 on this section, comparing it with the *De edendo* and *Olim edebatur actio*, §493. There is no significant difference here between our *Ordo* and the *De edendo*.

570 Cod. 4.1.12.2. On the *recusatio* of an oath, Nörr, *Prozessrecht*, 176 and Helmholz, *The Ius Commune*, 111.

571 Lévy, *La Hiérarchie*, 39 and n. 19.

572 On this passage in the *Ordo Bambergensis*, Litewski, *Zivilprozeß*, 582 n. 48.

573 Compare Bernard of Pavia, *Summa decretalium*, 58.

574 See Litewski, *Zivilprozeß*, 432.

mandate.⁵⁷⁵ In private matters, the tutor is able to tender the oath of the defendant, also the curator, a slave acting as the *oeconomus*, and also the heir, if he has free administration.⁵⁷⁶ A boy may not tender an oath,⁵⁷⁷ since boys under the age of fourteen are not compelled to swear, as in C 22 q. 5 c. 15.

One asks according to whose intent the oath ought to be received, the one giving or the one receiving it? Certain ones say to retender the oath, (one must consider) whether both parties have an honest intent,⁵⁷⁸ or only one does, or both, instead, a malicious intent. Indeed, if both have an honest and right intention, the oath is received according to their mutual understanding. If, however, both have a malicious intent, one must have recourse to the common understanding of the word and, in that sense, the words (of the oath) must be understood in the way that customarily is correct,⁵⁷⁹ as in *Extrav. Si inter aliquos*.⁵⁸⁰ However, if only one party has an evil understanding, whether the one giving the oath or the one receiving it, then God, Who is the witness of conscience,⁵⁸¹ thus accepts, just as that one to whom it is being vowed or who vows honestly and understands rightly, since one person's deception ought not defend another's deceit,⁵⁸² as in C 22 q. 5 c. 9.⁵⁸³

575 See Dig. 4.4.25.1. On the general mandate, Berger, *Encyclopedic Dictionary*, 575, describing *mandatum generale* as the mandator's 'general authorization concerning the administration of all affairs.' See Lévy, *La Hiérarchie*, 138 n. 17, citing also Bassianus, *Libellus*, §490. Comparing the *Ordo Bambergensis* here with *Olim edebatur actio* §278. 490 on general and special mandate, Litewski, *Zivilprozeß*, 167 and n. 182.

576 Bassianus may be behind the text, on which see Brown, "Representation and Agency Law," 335 n. 15, also 338–339 and n. 23 discussing our *Ordo*. See also Litewski, *Zivilprozeß*, 429, comparing *Olim edebatur actio*, §490, and Nörr, *Prozessrecht*, 30. See also here the *Practica legum*. That *libera administratio* could be considered by decretalists in respect to the papal grant of legation, Figueira, "Decretalists," 127.

577 Dig. 12.2.34.2. See Metz, "L'enfant," 20, 76, also Helmholz, *The Ius Commune*, 111.

578 Compare C 22 q. 5 d.p.c. 13.

579 Compare decretist commentary on C 22 q. 5 c. 9, s.v. *Quacumque*, for example by the *Summa Simonis*: Hic queritur secundum cuius intentionem debet recipi simplicem intentionem habeat, uel later, uel uterque uel alter dolosam. Et si quidem uterque simplicem et rectam habeat intentionem, secundum utriusque intellectum recipitur iuramentum.

580 Pope Alexander III (JL 13793, x 4.1.7). For later decretalist commentary on this letter regarding consent in marriage, Brundage, *Law, Sex, and Christian Society*, 437 and n. 106.

581 Isidore of Seville, *De mendacio*, 31.8, also C 22 q. 5 c. 9.

582 Compare the *Summa Simonis ad C 22 q. 5 c. 9*: Si alter uero simplicem, alter dolosum habet animum, secundum intentionem simplicis iuramentum recipitur, siue sit dans, siue recipiens iuramentum, quia dolus nemini debet patrocinium prestare.

583 See above, C 22 q. 5 c. 9.

One customarily asks whether a man sins more who swears on a stone or one who swears by God.⁵⁸⁴ The former doubly sins,⁵⁸⁵ since he mendaciously swears an oath and should not have done so that way, namely, by created things.⁵⁸⁶ However, if the penalty is heavier the more holy the thing by which one swears, then he subjects himself to a more serious perjury who vows mendaciously by God, as in C 22 q. 1 c. 16. In sum, it must be understood that sometimes one is prohibited from swearing an oath, unless it concerns making peace, as in C 22 q. 5 c. 17.

Concerning perjury, it must be maintained that it is sometimes called a false swearing, at other times a transgression of the oath, an indiscrete oath, or a lie confirmed by oath. The first and second are not always a sin; the third, however, always, but not always a crime. The fourth is always a crime.⁵⁸⁷ Moreover, if anyone once has perjured himself, he cannot be a witness concerning the rest of the proceedings,⁵⁸⁸ nor can he assent to an oath or stand as an oath-taker in his own suit or another's, as in C 22 q. 5 c. 14.

Again, one must note that are three ways a vow can be illicit: by its nature, the mode of speaking, or by an external reason.⁵⁸⁹ It is illicit by its own nature because what is sworn is against the law, Gospel, and pope. By the virtue of the law itself, then, it must not be observed. In this case, all the canons in C 22 q. 4 are understood as applying.⁵⁹⁰ It is illicit from how one swore, when he indiscreetly swears he would not do something, which otherwise could be legally done, for example, if one vowed he would never become bishop which, nevertheless, is a vow that must be kept, as in D 85 c. 1. It is illicit due to an intervening, external reason, (for example) if anyone, after having taken the simple religious vow of

584 C 22 q. 5 c. 10. On this text, Helmholz, *The Spirit*, 151.

585 See above, C 22 q. 5 c. 9.

586 Among several canons in Gratian, C 22 q. 1 d.p.c. 16. See also C 22 q. 1 c. 9, 10.

587 Compare *Summa Rufini ad C 22 princ.* Dicitur namque periurium falsa iuratio, dicitur periurium iuramenti transgressio; appellatur etiam periurium indiscretum iuramentum, dicitur quoque periurium non semper est peccatum, tertium vero semper est peccatum, sed non semper crimen, quartum semper est crimen.

588 Litewski, *Zivilprozeß*, 380 n. 473. None of the other *ordines* considered in this study treat this.

589 Again, compare *Summa Rufini ad C 22 princ.*: §Iam considerandum est, quibus modis dicantur illicita iuramenta. Iuramentum itaque illicitum est aliquando ex modo iurandi, aliquando ex eo, quod iuratur, aliquando ex causa ab extra veniente.

590 There are twenty-three canons in this *quaestio*.

chastity,⁵⁹¹ took a wife. To take a wife is not by its own nature a sin, but here it is a sin because of the contrary vow which had preceded it. Some also add that it is not prudent to go against the vow but that a three-year penance must be imposed for breaking the simple vow,⁵⁹² as in D 27 c. 3.

Concerning Judgments (Cap. XXI)

Whatever commanded by the judge that is not contrary to nature, law, or good customs is called a judgment.⁵⁹³ Some are interlocutory, others definitive, conditional, or dispositive.⁵⁹⁴ An interlocutory judgment is given by judges between the beginning and end of the trial.⁵⁹⁵ A conditional judgment must not be offered but, if given, shall be endured, as in C 2 q. 6 c. 29; yet, this judgment is given in both uncertain matters and trustworthy persons and frequently in trustworthy matters and persons, as in D 33 c. 7,⁵⁹⁶ C 35 q. 6 c. 4, C 35 q. 3 c. 20. Often the pope, the supreme patriarch, gives a judgment under condition, for example, if requests shine with the truth⁵⁹⁷ or when he has established something either by dispensation or out of consideration for time, age, or grave necessities.⁵⁹⁸ When the case is being judged by the same pope or his successor, it is able to be changed. C 35 q. 9 c. 4⁵⁹⁹ and C 35 q. 9 c. 6 speak to this. A dispositive judgment, if unjust, is able to be corrected, unless the correction is

-
- 591 On *simplex votum* in Gratian, the decretists, and papal decretals from the late twelfth century, Dannenberg, *Das Recht der Religiosen*, 154–63, though without considering the *ordines*.
- 592 Imposing a minimum of seven years, *Summa Lipsiensis*, ad D 27 c. 3, s.v. *Si uir usque tribus*: Maius est peccatum fractio uoti quam adulterium... ergo grauius debet puniri... uel tanta debet imponi penitentia ad minus septem annorum.
- 593 Arthur Skedl, *Die Nichtigkeitsbeschwerde in ihrer geschichtlichen Entwicklung. Eine civil-processuale Abhandlung* (Leipzig: Tauchnitz, 1886), 121, also Litewski, *Zivilprozeß*, 456 and n. 80, and 468 comparing the *De edendo* and *Olim edebatur actio* §660, 661.
- 594 Only the *Ordo Bambergensis* makes this distinction. See Litewski, *Zivilprozeß*, 457 n. 92, also 463 and n. 173.
- 595 Litewski, *Zivilprozeß*, 479. Compare also the *De edendo* here.
- 596 D 23 in edition. The correct citation is D 33 c. 7.
- 597 Litewski, *Zivilprozeß*, 557–58 n. 147, noting this phrase also appears in the *De edendo*, *Olim edebatur actio* §562, and other *ordines*.
- 598 On rescript here, Litewski, *Zivilprozeß*, 553 and n. 72, comparing the *De edendo* and *Olim edebatur actio* §218, 548.
- 599 On Gratian's thought here, inspired by the Roman doctrine of *restitutio in integrum*, Helmholz, *The Spirit*, 94.

unsuitable and less favorable, for example if a prelate or some other one gave an estate or something else to establish a church or to be consecrated for sacred use. It is disgraceful that what has been given for the founding of a church or appointed for holy use be revoked, as in C 17 q. 3 c. 41 and C 14 q. 6 c. 2. It also a natural impossibility, for an order unjustly conferred cannot be removed until its execution,⁶⁰⁰ as in C 1 q. 1 c. 97 and C 32 q. 7 c. 28. There are also dangerous times. For example, during persecution many things have to be allowed, as held in C 1 q. 7. The definitive sentence is the lawful declaration ending a controversy in court. The judge ought to form it in his heart not immediately but with deliberation after discussing the matter and then declare it in writing.⁶⁰¹ If he does otherwise, it does not merit the name of judgment,⁶⁰² as in C 2 q. 1 at the beginning.⁶⁰³ If the text contains something wrong, he ought to emend it and, with its parts rearranged, he then recites the corrected version in this fashion: 'I, John, Archbishop of the church of Dublin, the judge of the dispute between Arthur and Mellus, having heard the allegations, condemn Arthur.'⁶⁰⁴

After the suit has been recited, the judge shall not be permitted subsequently to make a correction, even if he could still (do this and) finish on the same day.⁶⁰⁵ When he passed judgment, he ceased to be judge; he performed his duty, whether well or badly.⁶⁰⁶ Possible exceptions to this are the Roman pontiff and the emperor.⁶⁰⁷ Again, it must be known that

600 On decretists' discussion of *executio* as a jurisdictional term, Benson, *The Bishop Elect*, 119–20.

601 On the *sententia diffinitiva*, Nörr, *Prozessrecht*, 193. Compare also Bassianus, *Libellus*, §649. An echo of Cod. 1.14.12 is also present. On the *Ordo* here, Skedl, *Die Nichtigkeitsbeschwerde*, 121 and n. 3, and Litewski, *Zivilprozeß*, 459 and n. 118, noting many other *ordines*.

602 Litewski, *Zivilprozeß*, 469 and nn. 255–256, 264.

603 C 2 q. 1 d.a.c. 1.

604 Fitting, "Zur Geschichte der Rechtswissenschaft im Mittelalter," 183, commenting on the text, dating it between 1182–1212, the tenure of John Comyn of Dublin, on whom see the introduction to this chapter, also Landau, "Die Anfänge," 19 and n. 7, Caillemer, *Le Droit civil*, 180–81, and Litewski, *Zivilprozeß*, 464.

605 Skedl, *Die Nichtigkeitsbeschwerde*, 123 and n. 14, also Litewski, *Zivilprozeß*, 487 n. 30.

606 There is close agreement with Bassianus, *Libellus*, §656.

607 Litewski, *Zivilprozeß*, 486 n. 18, noting also here the *Ordo Bambergensis*' concern that a papal *sententia conditionalis* could still be changed. Other *ordines* do not treat this topic. See also Legendre, *La pénétration*, 37.

the bishop is able to judge minor disputes without written decision and, especially, those of base matters,⁶⁰⁸ as in C 11 q. 1 c. 45.⁶⁰⁹

One must further note that decisions take the form of condemnation, absolution, command, excommunication.⁶¹⁰ The sentence of condemnation or absolution is sometimes unjust from cause, order, spirit. At other times, it is just in the same three ways, and sometimes just with respect to the cause yet unjust from order and spirit.⁶¹¹ And just as such things are able to be mixed up with one another, if the sentence was not entirely, or only in order, unjust, though just in other ways, by virtue of the law itself it does not hold, as in C 2 q. 1 in the beginning. However, if it was just from both spirit and order at the same time, or only from order, it ought to be preserved and, when confirmed by a silence of ten days, shall not be able to be retracted unless in certain cases, for example, if it were given against statutory law,⁶¹² or due to a payment to a corrupt judge, in which case by virtue of the law itself it is illegal, as in C 2 q. 6 c. 41 §6. It is also illegal if it

608 On this consideration of the bishop's judgment, Litewski, *Zivilprozeß*, 460 and n. 125.

609 Pennington, "Due Process, Community, and the Prince," n. 32, accessed at <http://faculty.cua.edu/pennington/Law508/procedure.htm> on 22 August 2013, noting the *Summa Stephani*, ad C 2 q. 1 s.v. *an in manifestis*, cited by Fowler-Magerl, *Ordo iudiciarius* 27–28 n. 76: Videndum quod ordo iudiciarius dicitur, ut apud suum iudicem quid conveniatur, ut legitime vocetur ad causam tribus edictis vel uno peremptorio pro omnibus, ut vocato legitime prestentur inducie, ut accusatio sollempniter et in scriptis fiat, ut testes legitimi producantur, ut non nisi in convictum vel confessum feratur <sententia>; que sententia non nisi in scriptis fieri debet, nisi sint breves lites et maxime vilium. See also the *Authenticum*, Nov. 117. c. 3.

610 Litewski, *Zivilprozeß*, 465–66 and n. 207, comparing also *Olim edebatur actio* §637.

611 C 11 q. 3 d.a.c. 1. Compare the *Summa Rolandi*, 25: Ad hoc notandum, quod sententia quandoque est iusta ex animo proferentis, causa, et ordine; quandoque iniusta ex animo proferentis, iusta tamen ex causa et ordine; quandoque iniusta ex animo et ordine, iusta vero ex causa. The *Summa Stephani* also follows Rolandus. The *Ordo Bambergensis*, however, seems closer to the *Summa Rufini*. On the *Ordo* here, Litewski, *Zivilprozeß*, 474. Such contrasting of just and unjust sentences may be unique among the early *ordines*. None of the treatises examined in this volume considers this. On how the Bolognese decretists reflected on Gratian and the question of just and unjust sentences, which could lie behind our treatise here, Kalb, "Rechtskraft und ihre Durchbrechungen," 415–19.

612 I follow here the translation of Rufinus on D 8 c. 1 in *From Irenaeus to Grotius. A Sourcebook in Christian Political Thought 100–1625*, ed. Oliver O'Donovan and Joan Lockwood O'Donovan, (Grand Rapids: Eerdmans, 1999), 302. See also Rudolf Weigand, "The Development of the *Glossa ordinaria* to Gratian's *Decretum*," in *The History of Medieval Canon Law*, 56.

contains manifest iniquity,⁶¹³ as found in the *Extrav.* to the Archbishop of York,⁶¹⁴ or delivered due to false documents,⁶¹⁵ in which case within a year, according to the canons and, up to twenty years according to the secular laws, it shall be able to be retracted,⁶¹⁶ according to the distinction entitled contumacy we made above and, in this case we have been so inclined, if the judge were following the text of the documents, and the question either not moved before the sentence, nor terminated, or only moved. Again, it shall be void if the decision were made from false witnesses, that is, on the basis of false testimonies.⁶¹⁷ Some, nevertheless, understand this as so if the witnesses were false and bribed since, if they were not bribed, but merely false, the sentence shall not be retracted,⁶¹⁸ as is found in the *Authenticum*.⁶¹⁹ The sentence thus shall be retracted not because the witnesses are false but because they are corrupted by money.⁶²⁰ Henceforth, these things which we have spoken concerning a sentence that may not be retracted must be understood in a civil, criminal, or pecuniary case, in which the sentence of the judicial order, having been declared and confirmed with integrity, shall not be able to be nullified in any way, save in the aforementioned cases.

Yet, there is a particular, spiritual, ecclesiastical case where the judicial decision concerning falsehood can be retracted by means of examination and appeal nor is it constituted to be otherwise than indicated: matrimony, which is spiritual, though indeed there is the rule that legal judgment prejudices the truth.⁶²¹ Nevertheless, it does not damage

613 On the distinction between manifest and occult crimes, the latter, offenses like simony, where an accuser might not appear, McAuley, "Canon Law and the End of the Ordeal," 484–85.

614 Pope Alexander III (JL 23878, WH 590a–c), on which see *Collectio Francofurtana* 32.5.

615 Litewski, *Zivilprozeß*, 536 and n. 153, comparing *Olim edebatur actio* §661.

616 Litewski, *Zivilprozeß*, 535 n. 146, comparing also Bulgarus, the *De edendo*, and *Olim edebatur actio* §669 and 536 n. 157, 160 contrasting the lengthy and short terms in civil and canon law.

617 Comparing the treatise here with Bulgarus, the *De edendo*, and *Olim edebatur actio*, §332, among several paragraphs, Litewski, *Zivilprozeß*, 536–37 and nn. 161–162.

618 Compare Bassianus, *Libellus*, §600: Sed non tenet sententia lata ex falsis attestacionibus vel falsis instrumentis de quorum falsitate prius quesitum non era; vel lata a corruptis iudicibus vel per corruptos testes; multo magis si per corruptos et falsos.

619 Cod. 9.22.9.

620 See Mausen, *Veritatis adiutor*, 756–57.

621 Compare *Summa Stephani*, ad C 16 q. 3 d.a.c. 9 s.v. *Item si de rebus*: Cum enim res iudicata praeiudicet veritati. Rufinus gives the same reading, on which see Kantorowicz, *Studies*,

holiness or religion, as in C 35 q. 9 d.p.c. 2.⁶²² Indeed, some consider this generally true in all things unless it endangers the salvation of the soul.⁶²³

Concerning the sentence of excommunication, briefly, one must know that, whether it was entirely just or unjust it holds, provided that it was not given after appeal, until nullified by a superior judge, as in C 11 q. 3 c. 4. Nevertheless, this does seem wrong and contrary to canonical equity, unless one assigns the reason of diversity, which is such: punishment accompanies excommunication. Immediately when the sentence is declared, one is excommunicated, separated from communion, and remains so until released by a superior judge.

Now, the sentence of precept follows.⁶²⁴ One must note that sometimes the prelate orders something against God and sometimes he does not. If he does this against God, this command must neither be held nor obeyed, as in C 11 q. 3 c. 91 and following.⁶²⁵ However, when he orders something not contrary to God, or is uncertain, it depends on whether or not what he commanded pertained to his office or his prelature. In the first case, he must be absolutely obeyed, as in C 11 q. 3 c. 11 and C 11 q. 3 c. 18 and C 23 q. 1 c. 4. In the second case, the one subject to him shall be free either to obey or not unless he is subject to one who, like God, is placed over his head, as in C 11 q. 3 c. 99 and C 19 q. 3 c. 2.

231, also, for the civilians' opinions concerning *res iudicata*, Vittorio Scialoja, "Dissensiones dominorum," *Studi e documenti di storia e diritto* 12 (1891): 252.

622 That this *dictum* reflecting the Church's desire to preserve marriage even when it seemingly violated rules of consanguinity, Brundage, *Law, Sex, and Christian Society*, 243 and n. 66.

623 Again, these are uncertain.

624 The sense must be a decision one cannot oppose. On the changing meaning of *praeceptum*, from positive law or prescription in the classical law to the late twelfth century, here citing the *Summa* 'Elegantius in iure divino,' which defines it as *non impune resistes*, Gilchrist, "Canon Law," 248.

625 C 11 q. 3 cc. 91–93.

Conclusion

Judge not according to appearances but give a just judgment.¹

I began this study with two Biblical citations. It seems appropriate to conclude with one more. Both Bishop Ivo in 1100 and the author of the *Ordo Bambergensis* at century's end undoubtedly knew it by heart. The Christian judge was to be no respecter of persons. He must be just. I am no less certain they were equally convinced that, despite the best efforts of the Church and her law, judges daily failed to live up to this calling.² Nor did justice abound. The world was no less fallen than in the days of Ananias and Sapphira, the church's court ever more crowded with advocates and their clients, not all pursuing justice in Christian love.

Unlike human nature, however, ecclesiastical procedure had changed dramatically in the course of the twelfth century. While Ivo of Chartres' letters reveal him to be, by the standards of the day, a very competent judge and legal counselor, we have an incomplete understanding of what procedural theory and practice meant to him. Granted, he had at his disposal many legal texts, from the *Digest* to Pseudo-Isidore, that commented on procedure. Nevertheless, as I emphasized in both the Introduction and Chapter 1, it remains unclear how bishops, even a learned and experienced one such as Ivo, interpreted and applied these remote texts.³

By 1200, procedural law had been transformed. Romano-canonical process was well underway. While many had a hand in this transformation, few rivaled the authors of the *ordines iudiciorum*. As we conclude this study, we should reflect on their accomplishment.

In chapter one, we considered labels legal historians have applied to the decades separating the Marturi Case and the *Ordo Bambergensis*. One we have not yet encountered is, I believe, particularly applicable to our study of procedural law: the 'Re-romanization of the West.'⁴ Civilian procedure was attractive

1 John 7.24. Bernard of Pavia combined it with Ps. 57.2, on which see Friedberg, *Quinque compilationes antiquae* 1, cited by Nörr, *Zur Stellung*, 59 n. 23.

2 Stephan Kuttner, *Harmony from Dissonance. An Interpretation of Medieval Canon Law* (Latrobe: St. Vincent's Archabbey, 1960).

3 Brett, "Canon Law and Litigation," 29.

4 R.C. Van Caenegem, *European Law in the Past and the Future. Unity and Diversity over Two Millennia* (Cambridge: Cambridge University Press, 2002), 73.

to both secular and ecclesiastical courts.⁵ It possessed venerable authority. On a practical level, it furnished an 'incomparable technique' for regulating everything from contracts and forms of proof to judgment itself.⁶ The authors of the *ordines* strove to 'Re-romanize' to meet a flood of litigation and accommodate legates and judges-delegate, many with decretals in hand.⁷

While the assimilation and application of Rome's procedural law would continue for centuries, the era of the *ordines* was brief. In this respect, they rather resemble the *summae* of the decretists. One could compare, for example, Huguccio's *Summa* to the *Ordo Bambergensis*. The former was absorbed by the ordinary gloss, the latter eclipsed by the procedural manuals of Richardus Anglicus and Tancred. Within a few decades, ecclesiastical procedure changed again, a change no less important than the passing of the ordeal and the composition of the *ordines*. To a jurist working at the curia of Innocent III, where accusatorial procedure was giving way to inquisition, the *ordines*, even the more synthetic treatises like the *Ordo Bambergensis*, might have seemed rather outmoded, perhaps even, as one scholar has suggested, a failure.⁸ Certainly, their procedure was inefficient compared to the papally-directed inquisitorial

-
- 5 Van Canegem, *European Law*, 74–76. Arguing that Roman law's influence on the twelfth-century Empire, above all during Barbarossa, has been misinterpreted and also emphasizing the varying degrees to which Italian communes employed the law, Emanuele Conte, "Roman Law vs. Custom in a Changing Society," in *Custom. The Development and Use of a Legal Concept in the Middle Ages. Proceedings of the Fifth Carlsberg Academy Conference on Medieval Legal History*, 2008, ed. Per Andersen and Mia Münster-Swendsen (Copenhagen: DJØF Publishing, 2009), 107–22. See also, in general, Wickham, *Courts and Conflict*.
 - 6 Gabriel Le Bras, "La formation du droit romano-canonique," in *Actes du Congrès de droit canonique cinquantième, Paris 22–26 Avril 1947*, ed. Pierre Andrieu-Guitrancour (Paris: Letouzey and Ané, 1949): 338.
 - 7 Roman law was, of course, not the only influence on canonistic procedure. See Peltzer, *Canon Law, Careers, and Conquest*, 56, highlighting custom, among other influences, in electoral procedure.
 - 8 Richard M. Fraher, "IV Lateran's Revolution in Criminal Procedure: The Birth of Inquisitio, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics," in *Studia in honorem*, 101–03, also 109, emphasizing Fourth Lateran's demand that judges keep records. See also his essay "Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," *Law and History Review* 7.1 (1989): 23–88. Critiquing Fraher, and arguing that the 'procedural revolution' was about more than 'greater efficiency' in dispensing justice, McAuley, "Canon Law and the End of the Ordeal," 476. McAuley argues that it was part of the 'struggle to define the proper limits of the secular and profane,' whose origins he finds in the *Dictatus papae*. The critique appears, to my mind, exaggerated; his thesis is also not as original as he believes.

process.⁹ Given the aspirations of modern law and governance towards increased efficiency and hierarchical control, the yielding of the *ordines*' accusatorial procedure to the inquisition thus marks a milestone on the path to modernity.¹⁰ That this led as well towards equity and justice is less certain,¹¹ a point to which we shall return.

As noted in chapter one, we must look beyond the jurists of Bologna and Rome to follow the development of Romano-canonical procedure. Most of this study has been spent in the Anglo-Norman world, where authors shaped civil and canon law to fit their disputes. Their *ordines* were probably intended for the same audience addressed by Vacarius in his *Liber pauperum*: jurists and advocates drawing upon a mixture of Roman and canon law.¹² No doubt, they were also acutely aware of the great issues of the day, from the disputes between Alexander III and Frederick Barbarossa to the conflict between Henry and Becket. However, there are only occasional traces of these to be found, for example in the addition to the *De edendo*. Overwhelmingly, their focus remained on the study and the court. The treatises were meant to instruct the student and serve churches expanding their legal and administrative staff to discipline clergy and laity, protect property and rights and, increasingly, to handle Rome and her judges-delegate.¹³

The *ordines* recognized the tension between the ideal and real. Both are evident, for example, in how the treatises handle delays and appeals. In both the civil and canon law, these were normative procedures with which a judge could not dispense and still claim to have judged fairly. Accordingly, our treatises catalogue them, and sometimes at considerable length. We also, however, have periodic reminders that the authors knew full well that they were open

9 Among many studies, Melodie H. Eichbauer, "Medieval Inquisitorial Procedure: Procedural Rights and the Question of Due Process in the 13th Century," *History Compass* 12/1 (2014): 72–83, also with survey of older literature. A classic treatment is by Edward Peters, *Inquisition* (Berkeley and Los Angeles: University of California Press, 1989); compare also McAuley, "Canon Law and the End of the Ordeal," 489–93.

10 Nörr, *Prozeßrecht*, 221.

11 Fraher, "IV Lateran's Revolution," 100 also, more generally, R.I. Moore, *The Formation of a Persecuting Society. Power and Deviance in Western Europe, 950–1250*, 2nd ed. (Oxford and New York: Wiley-Blackwell, 2007), 152–53.

12 Taliadoros, *Law and Theology*, 45–46.

13 Cheney, *From Becket to Langton*, 154. Noting the complementary views of Moore and Bermann with respect to 'legalized ecclesiastical bureaucracy,' Taliadoros, *Law and Theology*, 28.

to manipulation, even abuse.¹⁴ Litigants and their advocates sought to exploit them at every turn, beginning with the decision of whether to submit to arbitration or go to court. I suspect that William of Longchamp and John of Dublin would have envied the relatively independent, and no doubt far more immediate, judicial power wielded by Archbishop Hincmar.¹⁵ But those days were long past.

While all disputes concerned the ecclesiastical judge, the many passages in the *ordines* treating property surely reflect the prevalence of such litigation.¹⁶ Granted, many readers likely never had to answer questions like the disposal of property in a pending dispute (*res litigiosa*) or the damage to a contract caused by one party selling land for less than the agreed price (*laesio enormis*). On the other hand, the sheer volume, and frequency, of cases contesting property and rights, no doubt made our treatises a welcome resource for litigant, advocate, and judge. There is likely no better evidence for this than the *ordines*' frequent consideration of prescription.

In recent decades, scholars have paid much attention to a 'processual' approach towards understanding medieval law. It is my hope that this study will have also contributed to this focus on process.¹⁷ At the same time, however optimistic my comments above about the relevance of the *ordines* to litigation, one cannot be certain as to their role in court given the prevalence of arbitration.¹⁸ I am aware as well that only an extensive analysis of contemporary cases, which this study has not undertaken, could provide some sort of answer, if provisional, to that question. Looking for evidence of the *ordines* in litigation would certainly be a rewarding, and necessary, enterprise. It would be also fraught with challenges, not the least being the availability of ecclesiastical court records prior to the thirteenth century.¹⁹ There are other challenges

14 For example, the comments by Fowler-Magerl, *Ordo*, 12; however, Nörr, *Prozeßrecht*, 226, disputes that the Romano-canonical procedure promoted delay. That litigants played a significant role in the process is noted by Müller, *Päpstliche Delegationsgerichtsbarkeit*, 264. See also Wickham, *Courts and Conflict*, 102.

15 On the efforts by contemporary Italian bishop to defend, and differentiate, their legal powers from those being claimed by the 'secular elites' of the communes, Miller, "Religion Makes a Difference," 1100ff, demonstrating how purpose-built bishops' palaces, in both their architecture and ornamentation, strove to proclaim the distinctive, superior power of the bishop as judge.

16 While not discussing the *ordines*, see Stanley Chodorow, "Custom, Roman Canon Law, Economic Interests in Late Twelfth-Century England," in *Grundlagen des Rechts*, 290–99.

17 Wickham, *Courts and Conflict*, 303.

18 That rules should not be ignored, however, Wickham, *Courts and Conflict*, 305.

19 Fowler-Magerl, *Ordines*, 101.

as well. Similarities between the terminology of a treatise and a record, for example an episcopal act, does not mean one can securely establish any sort of connection, however tempting that might be. With all these reservations in mind, however, we should not exclude the possibility of the *ordines*' influence, whether direct or indirect.²⁰

Whether or not they ever took the *ordines* to court, readers could value the treatises' content and thematic arrangement. *Causa 2* of Gratian would have been neither complete nor convenient for student, advocate, or judge. By providing treatises that treated just procedural law, both civil and canon, the latter also updated by recent decretals, the *ordines* transformed how process would be preserved, studied, and applied. Just as the *summae* were 'a tool for cutting through the increasing mass of written words,'²¹ so too did the *ordines* 'cut through' the mass of legal tradition in order to provide useful, comprehensive handbooks for the judge and jurist. They fashioned a new 'framework' in which to view procedure.²²

The *ordines* thus signal a new way of reading the civil and canon law. They were distinctive; unlike the canonistic *summae*, for example, they were not dialectically conceived. They attracted their own textual community.²³ What one scholar has said about an earlier period of legal development (in late Anglo-Saxon England) rings, I believe, equally true for procedure in the early *ius commune*:²⁴

Together, these considerations suggest a rather different model of development, involving what might be termed the textualization of legal culture; that is to say, moves towards practices which were either experienced or understood in relation to certain written texts.

Prior to the twelfth century, procedural law, if incomplete without the full recovery of the *Digest*, was everywhere, but nowhere in particular. The *ordines*

20 West, "Legal Culture," 371.

21 Michael T. Clanchy, *From Memory to Written Record. England, 1066–1307* (Cambridge: Cambridge University Press, 1979), 84–85.

22 Milsom, *A Natural History of the Common Law*, 107.

23 Fundamental is Brian Stock, *The Implications of Literacy. Written Language and Models of Interpretation in the Eleventh and Twelfth Centuries*. (Princeton: Princeton University Press, 1983).

24 Pratt, "Written Law," 333.

helped to change that by gathering and organizing texts, both civilian and canonistic, in formats that could meet the demands of both study and practice.

As noted in chapter three, scholars have emphasized the degree to which the 'new law' of papal decretals came early and often to the Angevin realm. It is thus no accident that they play a role in our treatises. No less telling is the increasing attention paid by the *ordines* to delegated jurisdiction and appeal, subjects frequently addressed by Rome.²⁵ Accordingly, it comes as little surprise that Bishop and judge-delegate William of Longchamp composed an *ordo*, though whether he followed his own counsel we cannot say with any degree of confidence. Perhaps other judges-delegate or, perhaps, an archdeacon or learned cleric in their entourage composed the *Ordo Bambergensis* or the *De edendo*. Given their involvement in ecclesiastical litigation, the archdeacon would seem a particularly attractive candidate.²⁶

In chapter one, we considered how process facilitated legal change. In the decades following the death of Ivo of Chartres, jurisprudence not only became more elaborate and comprehensive—a profound change from earlier centuries—but also regularized in practice. As one scholar has noted, a defining feature of the 'pre-common law' in England was it lacked 'routinized methods of distinguishing fact and law.'²⁷ The same, indeed more, could be said about the canon law. 'Re-Romanization' led to 'routinization' of legal procedure.²⁸ William of Longchamp's differentiation between valid and invalid documents is but one example of this process, a process increasingly defined by rules.²⁹

Iudex and *advocatus* were far different at century's end. They were now *homo iuridicus*, expected to be skilled in both civil and canon law.³⁰ This 'legal man' took his place in medieval society alongside priest and warrior, and has devoted himself ever since to evaluating and fixing procedural rules.³¹ It was surely a difficult process at first given the profoundly alien quality presented by

25 Brundage, *Medieval Origins*, 156, also Müller, *Päpstliche Delegationsgerichtsbarkeit*, 216–17 on the need by the end of twelfth-century for both experience and formal legal training.

26 In general, Brian Kemp, "Archdeacons and Parish Churches in England in the Twelfth Century," in *Law and Government in Medieval England and Normandy*, 341–64, though without reference to any *ordo*.

27 White, "Inheritances," 102–03, commenting on the works of Milsom and Palmer.

28 David D'Avray, *Medieval Religious Rationalities. A Weberian Analysis* (Cambridge: Cambridge University Press, 2010), 133–36.

29 D'Avray, *Medieval Religious Rationalities*, 144–45.

30 Mayali, "Law and Time in Medieval Jurisprudence," 607–08.

31 On rules, precepts, and the formation of 'formal' out of 'free' law, Kantorowicz, *The Definition of Law*, xv–xvi, 30–32. See also the caution against assuming a 'system' of rules

the classical civil and canon law. Much of what was passed down to the *ordines* often did not correspond well, if at all, to day-to-day problems that drove litigants to court.³² Any effort towards ‘rationalization’ thus confronted first and foremost a historical, terminological challenge. Making sense of references to long-vanished imperial offices and provinces is a good example of this.³³ Yet our authors pressed on, biased towards the authority of Roman law and confident that they could achieve control of this problematic tradition and accommodate it to the canon law. The result was the formation of what Dr. Bauer has called ‘proceduralist society.’³⁴ Only when the past was contextualized and updated for the present, signaled by the occasional *hodie* in our tests, could there be legal education and professionalization.³⁵ Establishing that present in both study and practice was essential to determining what was ‘common’ in the *ius commune*.

The appearance of *homo juridicus* in the twelfth century is undoubtedly one of the most important, and lasting, achievements of the Middle Ages. Our understanding of procedure as a text-based, rule-bound, and academic, was born in the days of Glanvill and the *Ordo Bambergensis*. For all its differences, I believe that the parties in a modern courtroom, judge, lawyers, and litigants, would at least glimpse some things recognizable in an ecclesiastical court of

in practice made by Wickham, *Courts and Conflict*, 4. While his comments are confined here to the communal courts, they are worth bearing in mind as well for ecclesiastical litigation.

- 32 Figueira, “Decretalists,” 126. That, in court, the civil law may have often been more about ‘terminology and rhetoric, rather than about the content of legal thinking and argument,’ Wickham, *Courts and Conflict*, 50. On the difficulty of determining what legal texts intended, in this case, Anglo-Saxon codes, compare the comments of Wormald, *The Making of English Law*, 477–78.
- 33 Arguing that criticism of the ordeal and the transition to new procedure did not demonstrate secularization but, instead, should be seen in its religious context—certainly correct views to my mind, but views that specialists would not hold to begin with, McAuley, “Canon Law and the End of the Ordeal,” 477.
- 34 In addition to her essay “The Twelfth Century and the Emergence of the juridical subject,” see also “On the Historical Genesis of Legal Proceduralism.” Treating the English common law, and arguing that some of its “measures” may have come as a reaction to canon law as well, Hudson, *Land, Law, and Lordship*, 268.
- 35 Anthony Musson, *Medieval Law in Context. The Growth of Legal Consciousness from Magna Carta to the Peasants’ Revolt* (Manchester and New York: Manchester University Press, 2001), 7–8, discussing ‘dialogues of law’ and ‘legal consciousness.’ See also Meyer, *Distinktionstechnik*, 272–73.

1200.³⁶ That would not be likely to be as likely for the *audientia* of Bishop Ivo, just a few decades earlier.

Our litigious society thus emerged in the world of the *ordines*, a main reason why I began to work on these treatises in the first place. Whether our authors and the ‘proceduralist society’ they fashioned, and which we have inherited, should be praised or bewailed is, of course, a contentious matter.³⁷ For some readers, the procedural law we have encountered has likely been a portent of evils to come.³⁸ As R.C. van Caenegem noted years ago, unlike the jury system, the Romano-canonical process not only gave much, perhaps too much, power to the judge but also ‘prepared the ground for the exaggerations and abuses of the inquisitorial procedure and the excesses of the Inquisition of later times.’³⁹ Even if one does not directly link the procedural developments we have traced in the twelfth century to the later horrors of the Inquisition, and its more recent, secular, imitators, it is undeniable that they contributed to the ‘descending power’ of the modern state, where the system and its functionaries, not the individual, logic and efficiency—in theory, if not always in practice—not justice and mercy matter most of all.⁴⁰ As noted above, much of what Ivo of Chartres thought about legal process remains beyond our reach. But one thing was clear: he believed, like Saint Paul, that love was the fullness of the law.⁴¹ Discretion and mercy, not ‘the consistent application of rules’ was the essence of judgment.⁴² By century’s end, much has changed. Instead of mercy and discretion, we find the terms and procedures of Roman law. In all

36 On which see Helmholz, “The *litis contestatio*,” 85, noting also the continuing study of the *litis contestatio* and its effects in the later Middle Ages and beyond.

37 It was so even in the late twelfth century. On complaints about the arrogant *pauperistae* at Oxford whose pursuit of the Roman law had led to the decline of liberal studies, Boyle, “Legal Studies at Oxford,” 122–23 and Taliadoros, “Synthesizing the Legal,” 54–55, treating the complaints by Ralph Niger.

38 Medieval critics worried as well, if for different reasons. The body of literature is considerable, but see the introduction to chapter 2, also Legendre, *La pénétration*, 41–42 for criticisms and concerns from various figures, notably Bernard of Clairvaux and John of Salisbury.

39 Van Caenegem, “The Law of Evidence,” 298–99.

40 Van Caenegem, *European Law in the Past and the Future. Unity and Diversity over Two Millennia* (Cambridge: Cambridge University Press, 2002), 76, also his essay “The Law of Evidence in the Twelfth Century: European Perspective and Intellectual Background,” in *Proceedings Boston*, 302–03, noting the *ordines*’ contribution to bureaucracy. For a dissenting view, D’Avray, *Medieval Religious Religiosities*, 135–36, 149.

41 Brasington, *Ways of Mercy*, 141–42.

42 Keyser, “Agreement Supersedes,” 88, noting and citing the work of Koziol, *Begging Pardon and Favor*, 214–34.

the many lines of our *ordines*, *caritas*, charity, has never appeared. It would seem the *ius commune* had no place for it. Perhaps this silence was but the first sign of our modern court, where disputes, and their resolution, concern this world alone.⁴³

Some scholars have praised the *ius commune* and its procedure in the twelfth century. They emphasize its contribution to the developing western notion of the 'rule of law.'⁴⁴ We recall the letter of Ivo of Chartres in chapter one that concerned a disputed mill. In his day, such disputes might very well have been settled by trial by combat. By the time the *Ordo Bambergensis* was composed, litigants followed Romano-canonical procedure, with many cases referred to Rome.⁴⁵ No doubt, this was an improvement, particularly in the view of the losing party. To Richard Southern, such transformation of procedure contributed to the 'scholastic programme' intent on fashioning 'a more detailed and universal system of oversight and enforcement than had ever been possible before.'⁴⁶ If some view the *ordines* as contributing to the development of the state committed to discipline and punishment, Southern, instead, could see as part of a reform confidently striving to 'achieve a large-scale reversal of the Fall.'⁴⁷ He is not alone in this view.⁴⁸

But the true legal historian aims at finding out what rulers, jurists and subjects actually thought and did, and knows that they were sometimes less, but never more, than human.⁴⁹

Hermann Kantorowicz reminds us of the challenges awaiting anyone who explores legal history. The laws are difficult enough to understand; those in the twelfth century who read and applied them in court even more so. Of course, we can never engage them directly. Like our authors, we are 'never more than human.' For those taking a more positive, perhaps even pious, view, the *ordines*

43 Le Bras, "La formation du droit," 338 reflecting on how the civil law, its secular rules, could overwhelm the theological 'heart' of canon law.

44 Laurent Mayali, "The Development of Law in Classical and Early Medieval Europe: Foreward: Social Practices, Legal Narrative, and the Development of the Legal Tradition," 70 *Chicago-Kent Law Rev.* (1995): 1471.

45 On this, Dietrich Lohrmann, "Vom gerichtlichen Zweikampf zum Prozeß an der Kurie," in Lotte Kéry, et al. *Licet Preter Solitum. Ludwig Falkenstein zum 65. Geburtstag* (Aachen: Schaker Verlag, 1998): 55–66.

46 Southern, *Scholastic Humanism*, 22.

47 Southern, *Scholastic Humanism*, 34, also Nörr, *Zur Stellung*, 104.

48 D'Avray, *Medieval Religious Rationalities*, 130–31.

49 Kantorowicz, *The Definition of Law*, 36.

reflect the best of the twelfth-century Renaissance, where the law of Rome, both pagan and Christian, was being turned towards the creation of a more just world. If, as Erwin Panofsky argued so many years ago, the achievement of scholasticism was a cathedral of ideas soaring towards heaven, then the *ordines* numbered among its foundation stones.⁵⁰ I suspect, however, that many take a far darker view: our authors have appeared, at best, alien, and, at worst, repellent, their religious, political, and social assumptions utterly at odds with modern, secular orthodoxies. Viewed in hindsight, the medieval judge, lawyer, and jurisprudent can easily become servants of repressive regimes, whether lay or clerical, (and particularly the latter).⁵¹ For these readers, our *ordines* tell the tale of Church ever more committed to power and force, a Church where legislation replaced love.⁵²

Regardless of how one judges the *ordines* and their legacy,⁵³ they deserve careful consideration by both the defenders and critics of the medieval legal tradition. Whatever label one chooses to apply to their consequences—revolution, renaissance, or reform—they cannot be overlooked. Their defenders, no doubt a small band indeed, must confront the pointed, modern criticisms of the legal and political power to which they contributed. For critics who view the procedure of the *ius commune* as a tool of oppression, it is also well to remember that they cannot claim the truth before confronting the beliefs, buttressed by arguments, of those with whom they have disagreed.⁵⁴

Whether one applauds or condemns the judicial order constructed by the twelfth-century *ordines*, it is safe to assume, as argued above, that their authors

50 Erwin Panofsky, *Gothic Architecture and Scholasticism* (New York: Meridian, 1976). See also Bruce C. Brasington, "Lessons of Love: Bishop Ivo of Chartres as Teacher," in *Teaching and Learning in Northern Europe, 1000–1200*, ed. Sally N. Vaughn and Jay Rubenstein (Turnhout: Brepols, 2006), 145–47.

51 Henry Charles Lea, *Superstition and Force. Essays on the Wager of Law-The Wager of Battle-The Ordeal-Torture* (Philadelphia: Henry C. Lea, 1866).

52 Brown and Górecki. "What Conflict Means," 32, discussing 'intellectual domestication of force.'

53 Expressing reservations about Moore's views, Charles Donahue jr., "Malchus's Ear: Reflections on Classical Canon Law as a Religious Legal System," in *Lex et Romanitas. Essays for Alan Watson*, ed. Michael Hoeslich (Berkeley: Publications of the Robbins Collection, 2000), 113–14, accessed at <http://www.law.berkeley.edu/library/robbins/pdf/Watson.pdf> on 17 June 2014.

54 See John Stuart Mill, *On Liberty*, accessed at <http://www.bartleby.com/130/2.html> on 27 June 2014. On Mill here, see the essay by Steven F. Hayward, "Conservatives and Higher Ed," <http://www.newcriterion.com/articles.cfm/Conservatives---higher-ed-7920> accessed on 26 June 2014.

were acutely aware of the difference between the ideal and real. They knew full well the conflict between the norms of procedure and the desires of men eager to avoid or twist the law. Again, our world is no different. Their admonitions to judges, advocates, plaintiffs and defendants remain no less valid today, even if our society often rejects the religious and moral assumptions driving them.⁵⁵ Obviously, they failed to live up to those biblical values of brotherly love and correction expressed in the opening words to this study.⁵⁶ I am also confident they did not need to be reminded of this.⁵⁷ Yet they still believed, as do I, that all are destined for a final court to stand before a judge whose love fulfills the law. That hope inspires our final text in this study, surely the most remarkable of all: a jurisprudent's prayer:⁵⁸

Give your servant a teachable heart, skill to learn, ability to discern the truth, tenacity to retain what I have learned, so that I can be both instructed in the pursuits of knowledge and able to explore the secrets of sacred scripture. Grant me skill in words so that, whatever You do with your servant, I may be increased to offer patiently and humbly this work for the instruction of others and may it also grant success to me, Your Servant, and, to You, O Lord, glory and honor and, to my listeners, instruction. That He may deign to supply me, He Who lives with God the Father to reign through infinite ages and ages. Amen.

-
- 55 Uelmen, "A View of the Legal Profession," 1541 also Henry Mather, "The Medieval Revival of Roman Law: Implications for Contemporary Legal Education," 41 *The Catholic Lawyer* (Spring 2002): 361–62.
- 56 Harold J. Bermann, "Law and Love," *Episcopal Theological School Bulletin* 56 (1963): 11–14, rp. in his *Faith and Order. The Reconciliation of Law and Religion* (Grand Rapids and Cambridge: Eerdmanns, 1993, rp. 2000): 313–18.
- 57 Donahue, "Malchus' Ear," 117.
- 58 Placentinus, in Kantorowicz, "The Poetical Sermon," 41.220–226: Dona servo tuo cor docibile, intelligendi acumen, scientie discendi facilitatem, retinendi tenacitatem, quod possim et in disciplinarum studiis erudiri et sacre scripture rimari secreta et michi verborum tribue facundiam, ut, quicquid facies cum servo tuo, largitus valeam ad aliorum eruditionem patienter et humiliter proferre, ita quod michi famulo tuo cedat ad profectum et tibi, Domine, ad gloriam et honorem, et auditoribus ad eruditionem. Quod michi prestare dignetur, qui vivit cum Deo patre per infinita secula seculorum regaturus. Amen.

Selected Bibliography

Primary Sources

- Alcuin of York, *Dialoga de rhetorica et virtutibus*. PL 101.919–949.
- Anecdota quae processum civilem spectant*, edited Anton Wunderlich, Göttingen: Vanderhoeck and Ruprecht, 1841.
- Bassianus, Johannes. *Libellus de ordine iudiciorum*, edited by Giovanni Tamassia and Giovanni Battista Palmieri. In *Bibliotheca iuridica medii aevi*, 2.211–48. Bologna: In aedibus Societatis Azzoguidianae, 1888–1901; 2nd. ed. Bologna: Angelo Gandolfo, 1913; rp. Turin: Bottega d'Erasmus, 1962.
- Bulgarii ad Digestorum titulum de diversis regulis iuris antiqui commentarius*, ed. F.G.C. Beckhaus: Bonn, 1856, rp. Frankfurt am Main: Minerva, 1967.
- . *De arbitris*. <http://faculty.cua.edu/pennington/Law508/BulgarusDeArbitris.htm>.
- . *Excerpta legum*, edited by Ludwig Wahrmund, *Quellen zur Geschichte des römisch-canonischen Processes im Mittelalter*, 4.1. Innsbruck: Wagner, 1925, rp. Aalen: Scientia Verlag, 1962.
- Caillemer, Exupère. *Le droit civil dans les provinces anglo-normandes au xii^e siècle*. Paris: Ernest Thorin, 1993.
- The Casus Codicis of Wilhelmus de Cabriano*, edited by Tammo Wallinga. Frankfurt am Main: V. Klostermann, 2005.
- Codex iuris civilis*. Annotated by Fred H. Blume, accessed at http://www.uwyo.edu/lawlib/blume-justinian/_files/docs/book-8pdf/book8-36.pdf.
- Codex Theodosianus, cum constitutionibus Sirmondinis*, edited by Paul Krueger and Theodor Mommsen, 2 vols. in 3 (Berlin, Weidmann, 1905; rp. 1990), accessed at <http://ancientrome.ru/ius/library/codex/theod/tituli.htm>.
- Corpus iuris canonici*, edited by Emil Friedberg, 2 vols. Leipzig: Bernhard Tauchnitz, 1879, rp. Graz: Akademische Druck-u. Verlagsanstalt, 1959; vol. 1 (*Decretum Gratiani*) accessed at <http://geschichte.digitale-sammlungen.de/decretum-gratiani/online/angebot>; vol. 2 (*Liber Extra*), accessed at http://www.hs-augsburg.de/~harsch/Chronologia/Lspost13/GregoriusIX/gre_0000.html.
- Corpus iuris civilis*, edited by Paul Krueger, et al., 3 vols. Berlin: Weidmann, 1872–95, rp. 1963–65, accessed at <http://www.thelatinlibrary.com/justinian.html>.
- Decretales Pseudoisidorianae*, edited by KarlGeorg Schon, accessed at <http://www.pseudoisidor.mgh.de/>.
- De presbiteris criminosis: Ein Memorandum Erzbischof Hinkmars von Reims über straffällige Kleriker*, edited by Gerhard Schmitz. Hannover: Hahnsche Buchhandlung, 2004.

- Der Ordo iudiciarius des Codex Bambergensis P 1 n*, edited by Johann Friedrich von Schulte. Vienna: Adolf Holzhausen, 1872.
- Die Collectio Francofurtana: Eine französische Decretalensammlung. Analyse beruhend auf Vorarbeiten von Walther Holtzmann*, edited by Peter Landau and Gisela Drossbach. Vatican City: Biblioteca Apostolica Vaticana, 2007.
- Die Institutionenglossen des Gualcausus und die übrigen in der Handschrift 328 des Kölner Stadtarchivs erhaltenen Erzeugnisse mittelalterlicher Rechtskultur*, edited by Hermann Fitting. Berlin: Guttentag, 1891.
- Dissensiones dominorum sive controversiae veterum iuris Romani interpretum qui glossatores vocantur*, edited by Gustav Haenel. Leipzig: Teubner, 1834, rp. Aalen: Scientia Verlag, 1964.
- English Episcopal Acta II. Canterbury 1162–1190*, edited by Christopher R. Cheney and Bridgett E.A. Jones. London: Oxford University Press, 1986.
- English Episcopal Acta III. Canterbury 1193–1205*, edited by Christopher R. Cheney and Eric John. Oxford: Oxford University Press, 1986, rp. 1991.
- English Episcopal Acta VII. Hereford 1079–1234*, edited by Julia Barrow. Oxford: Oxford University Press, 1993.
- English Episcopal Acta VIII. Winchester 1070–1204*, edited by M.J. Franklin. Oxford: Oxford University Press, 1993.
- English Episcopal Acta XXXI. Ely 1109–1197*, edited by Nicholas Karn. Oxford: Oxford University Press, 2005.
- Epitome Juliani*, accessed at http://droitromain.upmf-grenoble.fr/Corpus/epitome_julien_2.htm#105.
- Foliot, Gilbert. *The Letters and Charters of Gilbert Foliot*, edited by Adrian Morey and C.N.L. Brooke. Cambridge: Cambridge University Press, 1967.
- Forschungen zur Reichs-und Rechtsgeschichte Italiens*, 4 vols., edited by Julius Ficker. Innsbruck: Wagner, 1874.
- Hariulf of Oudenberg. “Der Bericht des Abtes Hariulf von Oudenburg über sine Prozessverhandlungen an der römischen Kurie im Jahre 1141,” edited by Ernst Müller, *NA* 48 (1930): 101–15.
- Holtzmann, Walther, *Decretales ineditae saeculi. From the Papers of the Late Walther Holtzmann*, edited and revised by Stanley Chodorow and Charles Duggan. Vatican City: Biblioteca Apostolica Vaticana, 1982.
- Honorius. *Summa ‘De iure canonico tractaturus,’* edited by Stephan Häring et al. Vatican: Bibliotheca Apostolica Vaticana, 2010.
- Incerti auctoris ordo iudiciorum*, edited by G. Haenel. Leipzig: C. Hinrichius, 1838.
- Isidore of Seville. *Isidori hispalensis episcopi. Etymologiarum sive originum, libri xx*, 2 vols., edited by W.M. Lindsay. Oxford: Clarendon 1911, rp. 1962.
- Ivo of Chartres. *Decretum*, accessed at <https://ivo-of-chartres.github.io/decretum.html>.

- . *Epistolae*. PL 162.11–288B.
- . (Pseudo) *Panormia* <https://ivo-of-chartres.github.io/panormia.html>.
- Juristische Schriften des früheren Mittelalters*, edited by Hermann Fitting. Halle: Buchhandlung des Waisenhauses, 1876.
- Marbode of Rennes. *Marbodi episcopi redonensis opuscula aliquot*, edited by Heinrich Boehmer, *MGH Ldl* 3.691–692.
- Novellae Theodosiani* and *Novellae Valentiniani*, accessed at <http://ancientrome.ru/ius/library/codex/theod/tituli.htm>.
- Ordo iudiciorum cum glossa sub finem Saeculi XIII e Codice Trevirensi*, ed. L. Warnkönig. (Ghent: 1833).
- Patrologia cursus completa—series latina*, edited by J.-P. Migne, 221 vols. Paris: J.-P. Migne, 1841–64, accessed at http://www.documentacatholicaomnia.eu/1815-1875_Migne_Patrologia_Latina_01_Rerum_Conspectus_Pro_Tomis_Ordinatus_MLT.html.
- Paucapalea, *Summa*, edited by Johann Friedrich von Schulte. Giessen: E. Toth, 1890, rp. Aalen: Scientia Verlag, 1965.
- Pillii, Tancredi, Gratiae libri de iudiciorum ordine*, edited by F. Bergmann. Göttingen: Vanderhoeck and Ruprecht, 1842: rp. Aalen: Scientia Verlag, 1965.
- Placentinus, *Summa Codicis*. Mainz: 1536; rp. Turin: Bottega d'Erasmus, 1962.
- . *Sermo de legibus*, edited by Kantorowicz, *Rechtshistorische Schriften*, 127–35.
- Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, 5 vols., edited by Ludwig Wahrmund. Innsbruck: Wagner, 1905, rp. Aalen: Scientia Verlag, 1962.
- Questionibus de juris subtilitatibus. Zur zweiten säcularfeier der Universität zu Halle als Festschrift für ihre juristische Fakultät*, edited by Hermann Fitting. Berlin, 1894, rp. Frankfurt am Main: Keipel, 1977.
- Quinque compilationes antiquae necnon collectio canonum Lipsiensis*, edited by Emil Friedberg, Leipzig: B. Tauchnitz, 1882, rp. Graz: Akademische Druck- und Verlagsanstalt, 1956.
- Regesta pontificum romanorum ab condita ecclesia ad annum post Christum natum MCXCVIII*. 2nd edition by Phillip Jaffé, revised by S. Loewenfeld, F. Kaltenbrunner, and P. Ewald., 2 vols. Leipzig: Veit, 1885–88, rp. Graz: Akademische Druck- und Verlagsanstalt, 1956.
- Rogierius, *De diversis praescriptionibus*, PL 146.1494D–1495B.
- Rolandus. *Summa magistri rolandi nachmals Papstes Alexander III*, edited by Friedrich Thaner (Innsbruck: Wagner, 1874).
- Rufinus. *Summa Decretorum*, edited by Heinrich Singer. Paderborn: Ferdinand Schöningh, 1902, rp. Aalen: Scientia Verlag, 1963.
- Simon of Bisignano, *Summa in decretum Simonis Bisinianensis*, edited by P.V. Aimone. (Vatican City: Bibliotheca Apostolica Vaticana. 2014, accessed formerly at <http://web.colby.edu/canonlaw/2009/09/24/decretum-decretists/>).

- Stephen of Tournai. *Die Summa über das Decretum Gratiani*, edited by Johann Friedrich von Schulte. Giesen, E. Toth, 1891. rp. Aalen: Scientia Verlag, 1965.
- Summa "Elegantius in iure divino" seu Coloniensis*, edited by Gérard Fransen and Stephan Kuttner. Vatican City: Bibliotheca apostolica vaticana: 1969–90.
- Summa Lipsiensis. Summa "Omnis qui iuste iudicat" sive Lipsiensis*, edited by Rudolf Weigand, et al. Vatican City: Biblioteca Apostolica Vaticana, 2007.
- Summa Parisiensis. The Summa Parisiensis on the Decretum Gratiani*, edited by Terence P. McLaughlin. Toronto: Pontifical Institute of Medieval Studies. 1952.
- Summa Trecensis. (Summa Codicis des Irnerius)*, edited by Hermann Fitting. Berlin: J. Guttentag 1894.
- Theodosian Code: The Theodosian Code and Novels and the Sirmondian Constitutions*, trans. by Clyde Pharr. Princeton: Princeton University Press, 1952, rp. Union, NJ: Lawbook Exchange, 2001.

Secondary Sources

- Andersen, Per, Münster-Swendson, Mia, and Vogt, Helle. *Law Before Gratian. Law in Western Europe c. 500–1100. Proceedings of the Third Carlsberg Academy Conference on Medieval Legal History*, 2006, Copenhagen: DJØF Publishing, 2007.
- Arangio-Ruiz, Vincenzo. *Il mandato in diritto romano*. Naples: Casa Editrice Dott. E. Jovene 1949.
- Ascheri, Mario. *The Laws of Late Medieval Italy. Foundations for a European Legal System*. Leiden: Brill, 2013.
- . "Ins Wasser geworfen und Ozeane durchquert." *Festschrift für Knut Wolfgang Nörr*. Cologne, Weimar, Vienna: Böhlau Verlag, 2003.
- Austin, Greta. "Jurisprudence in the Service of Pastoral Care: The Decretum of Burchard of Worms." *Speculum* 79 (2004): 929–59.
- Avril, Joseph. "La participation du clergé diocésain aux décisions épiscopales." In *A Propos des actes d'évêques. Hommage à Lucie Fossier*, edited by Michel Parisse, 251–63. Nancy: Presses Universitaires de Nancy, 1991.
- Balfour, David Bruce. "William Longchamp: Upward Mobility and Character Assassination in Twelfth-Century England." PhD diss., University of Connecticut, 1996.
- Barnwell, P.S. "Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West." *Past and Present* 168 (2000): 6–29.
- Barrow, Julia. "Why Forge English Episcopal Acta?" In *The Foundations of Medieval English Ecclesiastical History. Studies Presented to David Smith*, edited by Philippa Hoskin, et al., 18–39. Woodbridge: Boydell, 2005.
- Bartlett, Robert. *Trial by Fire and Water. The Medieval Judicial Ordeal*. Oxford: Oxford University Press, 1986.

- Basdevant-Gaudemet, Brigitte. "L'Archidiacre et le gouvernement local de l'église d'après la législation conciliaire (milieu xii^e–milieu xiii^e siècle." In *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, 91–108.
- Bassani, Alessandra. "Necessitas ius constituit: la testimonianza de auditu alieno nelle fonte canonistiche." In *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, 215–48.
- Bauer, Dominique. "On the Historical Genesis of Legal Proceduralism." In *Ius Brabanticum, ius commune, ius gentium: Opstellen aangeboden aan prof. mr. J.P.A. Coopmans ter gelegenheid van zijn tachtigste verjaardag*, edited by E.J.M.F.C. Broers, B.C.M. Jacobs, R.C.H. en Lesaffer. 209–19. Nijmegen: Wolf, 2006.
- . "The Twelfth Century and the Emergence of the Juridical Subject—Some Reflections." *ZRG KA* 121 (2004): 207–27.
- Bellomo, Manlio. "Der Text erklärt den Text. Über die Anfänge der mittelalterlichen Jurisprudenz." In *Der Codex in Gebrauch*, edited by Christel Meier, et al., 61–28. Munich: Wilhelm Fink, 1996).
- . *L'Europa nell diritto commune*, 6th ed. Rome: Il Cigno, 1989.
- . *The Common Legal Past of Europe 1000–1800*, trans. Lydia G. Cochrane. Washington: Catholic University of America Press, 1995.
- and Condorelli, Orazio. *Proceedings of the Eleventh International Congress of Medieval Canon Law: Catania, 30 July–6 August 2000*. Vatican City: Bibliotheca Apostolica Vaticana, 2006.
- Benson, Robert L. *The Bishop Elect. A Study in Medieval Ecclesiastical Office*. Princeton: University of Princeton Press, 1968.
- . "Plenitudo potestatis: Evolution of a Formula from Gregory IV to Gratian." *Studia Gratiana* 14 (1967): 196–217.
- and Constable, Giles with Lanham, Carol Dana. *Renaissance and Renewal in the Twelfth Century*. Cambridge, Mass: Harvard University Press, 1982.
- Berardino, Angelo di. "L'immagine del vescovo attraverso I suoi titoli nel codice teodosiano." In *L'Évêque dans la cité*. 35–48.
- Berger, Adolf. *Encyclopedic Dictionary of Roman Law*. Philadelphia: The American Philosophical Society, 1953, rp. 1980.
- Bermann, Harold. *Law and Revolution. The Formation of the Western Legal Tradition*. Cambridge, Mass.: Harvard University Press, 1983.
- Bettetini, Andrea. "Res iudicata e veritas nel pensiero canonico classico." In *Proceedings Catania*, 383–99.
- Blumenthal, Uta-Renate. *The Investiture Controversy. Church and Monarchy from the Ninth to the Twelfth Century*. Philadelphia: University of Pennsylvania Press, 1988.
- . "Rom in der Kanonistik." In *Rom im hohen Mittelalter: Studien zu den Romvorstellungen und zur Rompolitik vom 10. bis zum 12. Jahrhundert*, Reinhard Elze zur Vollendung seines siebzigsten Lebensjahres gewidmet, edited by Benhard

- Schimmelpfenning and Ludwig Schmugge, 29–39. Sigmaringen: Jan Thorbecke Verlag, 1992.
- and Pennington, Kenneth, Larson, Atria. *Proceedings of the Twelfth International Congress of Medieval Canon Law: Washington, D.C. 1–7 August 2004*. Vatican City: Bibliotheca Apostolica Vaticana, 2008.
- Boyle, Leonard E. “The Beginnings of Legal Studies at Oxford.” In *Miscellanea Domenico Maffei*, 1.103–27.
- Brand, Paul. “Delay in the English Common Law Courts (Twelfth to Fourteenth Centuries).” In *The Law’s Delay. Essays on Undue Delay in Civil Litigation*, edited by C.H. van Rhee, 31–45. Tilburg: Intersectie, 2004.
- . “The English Difference: The Application of Bureaucratic Norms within a Legal System.” *Law and History Review* 21.2 (2003): 383–88.
- . *The Making of the Common Law*. London: Bloomsbury Academic, 2003.
- Brasington, Bruce C. “Avoiding the ‘Tyranny of a Concept’: Structural Considerations Concerning Twelfth Century Canon Law.” In *Das Eigene und das Ganze. Zum individuellen im mittelalterlichen Religiosentum*, edited by Gert Melville and Markus Schürer, 419–38. Münster, Hamburg, London: LIT Verlag, 2002.
- . “Collections of Bishops’ Letters as Legal Florilegia.” In *Law Before Gratian*, 73–122.
- . “*Crimina que episcopis inpingere dicis*: The Contribution of the *Collectio Polycarpus* to an Early *Ordo Iudiciorum*.” In *Readers, Texts, and Compilers in the Earlier Middle Ages. Studies in Honour of Linda Fowler-Magerl*, edited by Martin Brett and Kathleen Cushing, 123–35. Aldershot: Ashgate, 2008.
- . “Disputing the Dead: Litigation over *Sepultura* in the Diocese of Limoges in the Early 12th Century.” In *Law and Disputing in the Middle Ages. Proceedings of the Ninth Carlsberg Academy Conference on Medieval Legal History 2012*, edited by Per Andersen, et al., 41–54. Copenhagen: DJØF, 2013.
- . “The *Distinctiones Cantabrigenses* (Cambridge, UL Add. 3321.1): Authority, Power, and Jurisdiction in a Twelfth-Century Commentary on Gratian’s *Decretum*.” *ZRG KA* 127 (2011): 112–42.
- . “From Charitable Sentences to Amicable Settlements: A Note on the Terminology of Twelfth Century Canon Law.” In *Aspects of Charity. Concern for One’s Neighbor in the Medieval Vita Religiosa*, edited by Gert Melville, 1–10. Berlin, Münster, Vienna: LIT Verlag, 2011.
- . “A Lawyer of Sorts: Ralph Diss’ Knowledge of Canon and Civil Law.” In *Law and Learning in the Middle Ages. Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History, 2005*, edited by Helle Vogt and Mia Münster-Swendsen, 147–65. Copenhagen: DJØF, 2006.
- . “*Non imitanda set veneranda*: The Dilemma of Sacred Precedent in Twelfth-Century Canon Law.” *Viator* 23 (1992): 135–52.

- . "A Note on a Glossary to a Carolingian Canon Law Manuscript." *Pecia* 2 (2003): 7–12.
- . "Private Life in Canon Law Collections Attributed to Bishop Ivo of Chartres." In *Law and Private Life in the Middle Ages. Proceedings of the Sixth Carlsberg Academy Conference on Medieval Legal History 2009*, edited by Per Andersen, et al., 149–64. Copenhagen: DJØF, 2011.
- . "Prologues to Canonical Collections as a Source for Jurisprudential Change to the Eve of the Investiture Contest." *Frühmittelalterliche Studien* 28 (1994): 226–42.
- . "Remember Always Ananias and Sapphira." In *Obedientia: Zur Formen und Grenzen von Macht und Unterordnung im mittelalterlichen Religiosentum*, edited by Sébastien Barret and Gert Melville, 83–97. Münster, Hamburg, London: LIT Verlag, 2005.
- . *Ways of Mercy: The Prologue of Ivo of Chartres: Edition and Analysis*. Münster, Hamburg, London: LIT Verlag, 2004.
- and Cushing, Kathleen G. *Bishops, Texts and the Use of Canon Law Around 1100. Essays in Honour of Martin Brett*. Aldershot: Ashgate 1998.
- Brett, Martin. "The Bishop's Charter and the Law in Twelfth-Century England." In *Proceedings Esztergom*, 3–16.
- . "Canon Law and Litigation: The Century Before Gratian." In *Medieval Ecclesiastical Studies in Honour of Dorothy Owen*, 21–40.
- Brooke, Christopher N.L. "English Episcopal *Acta* of the Twelfth and Thirteenth Centuries." In *Medieval Ecclesiastical Studies in Honour of Dorothy M. Owen*, 41–56. Woodbridge: Boydell, 1995.
- Brown, Elizabeth A.R. "Representation and Agency Law in the Later Middle Ages. The Theoretical Foundations and the Evolution of Practice in the Thirteenth- and Fourteenth-Century Midi." *Viator* 3 (1972): 329–64.
- Brown, Warren. "Conflict, Letters, and Personal Relationships in the Carolingian Formula Collections." *Law and History Review* 25 (2007): 323–44.
- . *Unjust Seizure. Conflict, Interest, and Authority in an Early Medieval Society*. Ithaca and London: Cornell University Press, 2001.
- Brundage, James. "The Advocate's Dilemma: What Can You Tell the Client? A Problem in Legal Ethics." In *Medieval Church Law and the Origins of the Western Legal Tradition*, 201–10.
- . "The Ambidextrous Advocate: A Study in the History of Legal Ethics." In *Ins Wasser geworfen*, 39–56.
- . "The Calumny Oath and the Ethical Ideals of Canonistic Advocates." In *Proceedings Munich*, 796–97.
- . "Doctoribus bona dona. Suits to Recover Unpaid Legal Fees." In *The Creation of the Ius Commune*, 277–94.

- . "The Ethics of Advocacy: Confidentiality and Conflict of Interest in Medieval Canon Law." In *Grundlagen des Rechts*, 453–66.
- . "Juridical Space: Female Witnesses in Canon Law." *Dumbarton Oaks Papers* 52 (1998): 147–56.
- . *Law, Sex, and Christian Society in Medieval Europe*. Chicago and London: University of Chicago Press, 1990.
- . *The Medieval Origins of the Legal Profession. Canonists, Civilians, and Courts*. Chicago and London: University of Chicago Press, 2008.
- . *Profession and Practice of Medieval Canon Law*. Farnham: Variorum, 2004.
- . "The Rise of Professional Canonists and the Development of the *Ius Commune*," *ZRG KA* 81 (1995): 26–63.
- Buckland, W.W. *Manual of Roman Private Law*, 2nd ed. Cambridge: Cambridge University Press, 1939.
- . *A Text-Book of Roman Law from Augustus to Justinian*, 3rd ed. rev. by Peter Stein. Cambridge: Cambridge University Press, 2007.
- Caenegem, R.C. van. *European Law in the Past and the Future. Unity and Diversity over Two Millennia*. Cambridge: Cambridge University Press, 2002.
- Cairns, John W. and du Plessis, Paul J. *The Creation of the Ius Commune. From Casus to Regula*. Edinburgh: Edinburgh University Press, 2010.
- and Olivia F. Robinson. *Critical Studies in Ancient Law and Legal History. Essays in Honour of Allan Watson*. Oxford and Portland: Hart, 2001.
- Chaplais, Pierre. *English Diplomatic Practice in the Middle Ages*. London and New York: Hambledon, 2003).
- Cheney, Christopher R. *From Becket to Langton. English Church Government 1170–1213*. Manchester: University of Manchester Press, 1956, rp. 1965.
- . *The English Church and its Laws*. London: Variorum, 1982.
- . "Rules for the Observance of Feast-Days in Medieval England." *Bulletin of the Institute of Historical Research* 34 (1961): 117–47.
- Cheney, Mary. "Possessio/proprietas in Ecclesiastical Courts in mid-12th-century England." In *Law and Government in Medieval England and Normandy. Essays in Honour of Sir James Holt*, edited by G. Garnett and J. Hudson, 242–54. Cambridge: Cambridge University Press, 1994.
- . *Roger, Bishop of Worcester 1164–1179: An English Bishop in the Age of Becket*. Oxford: Oxford University Press, 1981.
- Chodorow, Stanley. "Custom, Roman Canon Law, Economic Interests in Late Twelfth-Century England." In *Grundlagen des Rechts*, 291–99.
- . *Proceedings of the Eighth International Congress of Medieval Canon Law: San Diego, University of California at La Jolla, 21–27 1988*. Vatican City: Bibliotheca Apostolica Vaticana, 1992.
- Cimma, M.R. *L'Episcopalis audientia nelle costituzioni imperiali da Costantino a Giustiniano*. Turin: Giappichelli, 1989.

- Classen, Peter. "Italienische Rechtsschulen ausserhalb Bolognas." In *Proceedings Berkeley*, 202–21.
- Coing, Helmut. *Handbuch der Quellen und Literature der neueren europäischen Privatrechtsgeschichte*, vol. 1: *Mittelalter, 1100–1500. Die gelehrten Rechte und die Gesetzgebung*. Munich: C.H. Beck, 1973.
- Condorelli, Orazio, et al. *Der Einfluss der Kanonistik auf die europäische Rechtskultur*. Cologne, Weimar, and Vienna: Böhlau, 2009.
- Cortese, Emilio. "Équité e justice la dynamique bipolaire du droit au moyen âge." In *Mélanges Anne Lefebvre-Teillard*, 299–313.
- . "Theologie, droit canonique et droit romain. Aux origines du droit savant (xi–xii siècle)." *Academie des inscriptions et belles lettres comptes rendues des séances* 146.1 (2002): 57–74.
- Cubitt, Catherine. "Bishops and Councils in Late Saxon England: The Intersection of Secular and Ecclesiastical Law." in *Recht und Gericht*, 151–68.
- D'Alterouche, et al. *Mélanges en l'honneur d'Anne Lefebvre-Teillard*. Paris: Éditions Panthéon-Assas, 2009.
- Dannenbergh, Lars-Arne. *Das Recht der Religiösen in der Kanonistik des 12. und 13. Jahrhunderts*. Münster, Hamburg, London: LIT Verlag, 2007.
- Davis, R.H.C. *King Stephen*, 3rd ed. Harlow: Longman, 1990.
- d'Avray, David. *Medieval Religious Rationalities. A Weberian Analysis*. Cambridge: Cambridge University Press, 2010.
- . *Rationalities in History. A Weberian Essay in Comparison*. Cambridge: Cambridge University Press 2010.
- Davies, Wendy and Fouracre, Paul. *The Settlement of Disputes in Early Medieval Europe*. Cambridge: Cambridge University Press, 1986.
- Declerc, Georges. "Between Legal Action and Performance. The *firmatio* of Charters in the Early Middle Ages." In *Medieval Legal Process. Physical, Spoken and Written Performance in the Middle Ages*, edited by Marco Mostert and P.S. Barnwell, 55–73. Turnhout: Brepols, 2011.
- Dolezalek, Gero. "Research on Manuscripts of the Corpus Iuris with Glosses Written During the 12th and Early 13th Centuries: State of Affairs." In *Miscellanea Domenico Maffei*, 1.143–71.
- Donahue Jr., Charles. "Bassianus, that is to say Bazianus? Bazianus and Johannes Bassianus on Marriage." *Rivista internazionale di diritto comune* 14 (2003): 41–82.
- . "Gérard Pucelle as a Canon Lawyer: Life and the Battle Abbey Case." in *Grundlagen des Rechts*, 333–48.
- . "A New Synthesis of the History of Canon Law in the Classical Period." *ZRG KA* 96 (2010): 609–15.
- . "Proof by Witnesses in the Church Courts." In *On the Laws and Customs of England. Essays in Honor of Samuel E. Thorne*, edited by Morris Arnold et al., 127–58. Chapel Hill: University of North Carolina Press, 1982.

- Drossbach, Giesela. "Decretals and the Schools? The *Collectio Francofurtana*." *BMCL NS* 24 (2000): 65–77.
- . "Die Entwicklung des Kirchenrechts als raumübergreifendes Kommunikationsmodell im 12. Jahrhundert." In *Zentrum und Netzwerk. Kirchliche Kommunikationen und Raumstrukturen im Mittelalter*, edited by Giesela Drossbach et al., 41–62. Berlin and New York: Walter DeGruyter, 2008.
- Duggan, Anne J. "De consultationibus: The Role of Episcopal Consultation in the Shaping of Canon Law in the Twelfth Century." In *Bishops, Texts and the Use of Canon Law Around 1100*, 191–214.
- . "Making Law or Not? The Function of Papal Decretals in the Twelfth Century." In *Proceedings Esztergom*, 41–70.
- . "The Nature of Alexander III's Contribution to Marriage Law, with Special Reference to 'Licet preter solitum,'" In *Law and Marriage in Medieval and Early Modern Times*, edited by Per Andersen and Ditlev Tamm, 43–64. Copenhagen: DJØF, 2012.
- . "Roman, Canon, and Common Law in Twelfth-Century England. The Council of Northampton (1164) Re-Examined." *Historical Research* 83 (2010): 379–409.
- Duggan, Charles. *Canon Law in Medieval England. The Becket Dispute and Decretal Collections*. London: Athlone Press, 1982.
- . "Decretal Collections from Gratian's *Decretum* to the *Compilationes antiquae*: The Making of the New Case Law." In *The History of Medieval Canon Law*, 246–92.
- . *Decretals and the Creation of the 'New Law' in the Twelfth Century. Judges, Judgments, Equity and the Law*. London: Variorum, 1998.
- . "Improba pestis falsitatis: Forgeries and the Problem of Forgery in Twelfth-Century Decretal Letters (with special reference to English cases)." In *Fälschungen im Mittelalter. Gefälschte Rechtstexte der bestraften Fälscher*, 6 vols., edited by Horst Fuhrmann, et al., 2.319–61. Hannover: Hahnsche Buchhandlung, 1988.
- . "Papal Judges Delegate and the Making of the 'New Law' in the Twelfth Century." In *Cultures of Power. Lordship, Status, and Process in Twelfth-Century Europe*, edited by Thomas N. Bisson, 172–99. Philadelphia: University of Pennsylvania Press, 1995.
- . *Studies in the Collections of Twelfth-Century Decretals. From the Papers of the late Walther Holtzman*, edited, revised, and trans. by Christopher and Mary Cheney. Vatican City: Biblioteca Apostolica Vaticana, 1979.
- . *Twelfth-Century Decretal Collections and their Importance in English History*. London: Athlone Press, 1963.
- Erdő, Péter and Szuromi, Szabolcs Anzelm. *Proceedings of the Thirteenth International Congress of Medieval Canon Law: Esztergom, 3–8 August 2008*. Vatican City: Bibliotheca Apostolica Vaticana, 2010.

- Everett, Nicholas. "Law Documents and Archives in Early Medieval Spain and Italy, c. 400–700." In *Documentary Culture and the Laity in the Early Middle Ages*, edited by Warren C. Brown, et al., 63–94. Cambridge: Cambridge University Press, 2013.
- Falkenstein, Ludwig. "Radulf von Sarre als päpstlicher Delegat und seine Mitdelegaten." in *Grundlagen des Rechts*, 301–32.
- Feenstra, Robert. "Action publicienne et preuve de la propriété, principalement d'après quelques romanistes du Moyen Âge." In *Fata iuris romani. Etudes d'histoire du droit*, 119–38. Leiden: Presses universitaires de Leyden, 1974.
- Feldner, Birgit. "Women's Exclusion from the Roman *Officium*." *Forum historiae iuris*, accessed at <http://fhi.rg.mpg.de/articles/0209feldner.htm> on 22 November 2013.
- Figueira, Robert. "*The Canon Law of Medieval Legations*." PhD diss., Cornell, 1980.
- . "Decretalists, Medieval Papal Legation, and the Roman Law of Offices and Jurisdiction," *Res publica litterarum* 9 (1986): 110–35.
- . "Subdelegation by Papal Legates in Thirteenth-Century Canon Law: Powers and Limitation." In *In iure veritas: Studies in Canon Law in Memory of Schafer Williams*, edited by Steven B. Bowman and Blanche E. Cody, 56–79. Cincinnati: College of Law 1991.
- Fiorelli, Piero. *La tortura giudiziaria nel diritto commune*, 2 vols. Rome: Giuffrè, 1953–1954.
- Firey, Abigail. *A Contrite Heart: Prosecution and Redemption in the Carolingian Empire*. Leiden and Boston: Brill, 2009.
- Fögen, Marie Theres. "Learned Law and the Desire of Politics. Barbarossa Meets Bulgarus and Martinus." In *Law and Learning*, 29–40.
- Fournier, Paul. *Mélanges de droit canonique*, 2 vols., edited by Theo Kölzer. Aalen: Scientia Verlag, 1983.
- . "Yves de Chartres et le droit canonique." *Revue des Questions Historiques* 63–64 (1898): 51–98, 384–405.
- Fowler (Magerl), Linda. "Forms of Arbitration." In *Proceedings Toronto*, 133–35.
- Fowler-Magerl, Linda. *Ordines iudicarii and libelli de ordine iudiciorum: From the Middle of the Twelfth to the End of the Fifteenth Century*. Turnhout: Brepols, 1994.
- . *Ordo iudiciorum vel ordo iudiciarius. Begriff und Literaturegattung*. Frankfurt am Main: Klostermann, 1984.
- . "The Use of the Letters of Pope Gregory I in Northeastern France and Lorraine before 1100." In *Ins Wasser geworfen*, 237–60.
- Fraher, Richard M. "The Becket Dispute and Two Decretist Traditions: The Bolognese Masters Revisited and Some New Anglo-Norman Texts." *Journal of Medieval History* 4 (1978): 347–68.
- . "Ut nullus describatur reus prius quam convincatur: Presumption of Innocence in Medieval Canon Law?" In *Proceedings Berkeley*, 493–506.

- Franklin, James. "Probable Opinion." In *The Oxford Handbook of British Philosophy in the Seventeenth Century*, edited by R. Anstey, 349–72. Oxford: Oxford University Press, 2013. Accessed at <http://web.maths.unsw.edu.au/~jim/ox17th.pdf> on 15 July 2015.
- . *The Science of Conjecture: Evidence and Probability Before Pascal* (Baltimore: Johns Hopkins University Press, 2001)
- Franklin, Michael J. and Harper-Bill, Christopher. *Medieval Ecclesiastical Studies in Honour of Dorothy Owen*. Woodbridge: Boydell, 1995.
- Fransen, Gérard. "Colligite Fragmenta: La *Summa Elnonensis*." *Studia Gratiana* 13 (1967): 85–108.
- and Legendre, Pierre. "Rectifications et additions au texte imprimé de la 'Practica legum et decretorum.'" *Revue d'histoire du droit français et étranger* (1966): 115–18.
- Fried, Johannes. *Die Entstehung des Juristenstandes im 12. Jahrhundert. Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena*. Cologne and Vienna: Böhlau Verlag 1974.
- . "Die römische Kurie und die Anfänge der Prozeßliteratur." *ZRG KA* 59 (1973): 151–74.
- Fuhrmann, Horst. *Einfluß und Verbreitung der pseudoisidorischen Fälschungen von ihrem Auftauchen bis in die neuere Zeit*, 3 vols. Stuttgart: Anton Hiersemann, 1972–1974.
- Garcia y Garcia and Weimark, Peter. *Miscellanea Domenico Maffei. Dicata. Historia-Ius-Studium*. 3 vols. Goldbach: Keip, 1995.
- Gaudemet, Jean. "A propos de la preuve dans le droit canonique médiéval." In *Miscellanea Dominico Maffei*, 2.1–10.
- Gilchrist, John. "Canon Law." In *Medieval Latin*, 241–53.
- Giuliani, Alessandro. "L' Ordo iudiciarius' medievale tra retorica e logica." In *Die Kunst der Disputationen. Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert*, edited by Manlio Bellomo, 133–46. Munich: R. Oldenbourg, 1998.
- Gordley, James. "Good Faith in Contract Law in the Medieval *Ius Commune*." In *Good Faith* 95–106.
- Gordon, William M. "Translation and Interpretation." In *Critical Studies in Ancient Law and Legal History*, 61–72.
- Górecki, Piotr. "A View from a Distance." *Law and History Review* 21.2 (2003): 367–76.
- Gouron, André. "A la convergence des deux droits: Jean Bassien, Bazianus et Maître Jean." *TRG* 59 (1991): 319–32.
- . "Canon Law in Parisian Circles before Stephan of Tournai's *Summa*." In *Proceedings San Diego*, 497–503.
- . "Dénonciation de nouvel oeuvre et pratique méridionale." In *Life, Law and Letters: Historical Studies in Honour of Antonio Garcia y Garcia*, edited by Peter Linehan, et al., 401–14. Rome: Libreria Ateneo salesiano, 1998.

- . "L'auteur du 'Brachylogus': Un compagnon de Thomas Becket en exil?," In *A Ennio Cortese*, edited by Domenico Maffei, et al., 3 vols., 2.163–73. Rome: Il Cigno, 2001.
- . "L'enseignement du droit civil au xii^e siècle: De la coutume à la règle." In *Manuels, programmes de cours et techniques d'enseignement dans les universités médiévales*, edited by J. Hamesse, 183–99. Turnhout: Brepols, 1994.
- . *Juristes et droits savants: Bologne et la France Médiévale*. Aldershot: Ashgate, 2000.
- . "La diffusion des premiers recueils de questions disputées: des civilistes aux canonistes." In *Studia in honorem eminentissimi Cardinalis Alphonsi M. Stickler*, 157–69.
- . *La science du droit dans le Midi de la France au Moyen Âge*. London: Variorum, 1984.
- . "Le Rôle de l'avocat selon la doctrine romaniste du douzième siècle." In *L'assistance dans la résolution des conflits. Quatrième partie*. 7–19. Bruxelles: De Boeck Université, 1998.
- . "Le rôle des maîtres français dans la renaissance juridique du xii^e siècle." *Comptes-rendus des séances de l'Académie des Inscriptions et Belles Lettres* 133.1 (1989): 198–207.
- . "Les Quaestiones de juris subtilitatibus: Une oeuvre du maître parisien Albéric." *Revue Historique* 303 (2001): 343–62.
- . "Liberté, servage, et glossateurs." *Recueil de mémoires et travaux publié par la Société d'histoire du droit et des institutions des anciens pays de droit écrit* 11 (1980): 41–51.
- . "Medieval Courts and Towns: Examples from Southern France." *Fundamina. A Journal of Legal History* 1 (1992): 30–46.
- . "Modèles de libelles accusatoires en pays alémanique (Zurich, 1147) et en Provence (Nîmes ou Avignon, 1154/1150)." In *Ins Wasser geworfen*, 307–16.
- . "Observations sur le *Stemma Bulgaricum*." In *Cristianità ed europa. Miscellanea di studi in onore di Luigi Prosdocimi*, edited by Cesare Alzati, 485–95. Rome, Freiburg, Vienna: Herder, 1994.
- . *Pionniers du droit occidental au Moyen Âge*. Burlington: Ashgate, 2006.
- . "Placentinus, 'Herold' der Vermutungslehre?" *Festschrift zum 65. Geburtstag und zur Emeritierung Professor Dr. Hans Kiefner, herausgegeben von Freunden, Kollegen, und Mitarbeitern*, edited by Albert Bleckmann, 90–103. Münster, 1994.
- . "Qui a écrit l'ordo 'Olim edebatur?'," *Initium* 8 (2003): 79–80.
- . "Un traité écossais du douzième siècle: l'ordo 'Ulpianus de edendo,'" *TRG* 78 (2010): 1–13.
- . "Une école de canonistes anglais à Paris: Maître Walter et ses disciples (vers 1170)." *Journal des Savants* (Janvier–Juin, 2000): 47–72.
- . "Une école ou des écoles? Sur les canonistes français vers 1150–vers 1210." In *Proceedings Berkeley*, 223–40.

- . "Un traité juridique d'origine irlandaise: le 'Livre de Florence.'" *Initium* 9 (2004): 61–71.
- . "Testis unus, testis nullus dans la doctrine juridique du xii siècle." In *Mediaeval Antiquity*, edited by Andries Welkenhuysen et al., 83–94. Louvain: Leuven University Press, 1995.
- . "Usage de l'hypothèse et reconstruction historique de la science civilistique au xii^e siècle." *Accademia nazionale dei lincei. Atti dei convegni Lincei* 111 (Rome, 1994): 91–106.
- . "Utriusque partis allegationibus auditis." In *Justice et justiciables. Mélanges Henri Vidal*, 35–45. Montpellier: Faculté de droit, d'économie et de gestion de Montpellier, 1994.
- Harries, Jill. *Law and Empire in Late Antiquity*. Cambridge: Cambridge University Press, 1999.
- . "Resolving Disputes: The Frontiers of Law in Late Antiquity." In *Law, Society, and Authority in Late Antiquity*, edited by Ralph W. Mathisen, 68–82. Oxford: Oxford University Press, 2001.
- Hart, H.L.A. *The Concept of Law*. Oxford: Oxford University Press, 1961.
- Hartmann, Wilfried. "Autoritäten im Kirchenrecht und Autorität des Kirchenrechts in der Salierzeit." In *Die Salier und das Reich*, 3 vols., edited by Stefan Weinfurter, 3.425–46. Sigmaringen: Jan Thorbecke Verlag, 1991.
- . "Der Bischof als Richter nach den kirchenrechtlichen Quellen des 4. bis 7. Jahrhunderts." In *La giustizia nell'alto medioevo*, 805–42.
- . "Der Bischof als Richter. Zum geistlichen Gericht über kriminelle Vergehen von Laien im früheren Mittelalter." *Römische Historische Mitteilungen* 28 (1986): 103–24.
- . "Die Briefe Fulberts als Quelle für die Praxis des bischöflichen Gerichts in Frankreich am Beginn des 11. Jahrhundert." In *Grundlagen des Rechts*, 93–103.
- . *Kirche und Kirchenrecht um 900. Die Bedeutung der spätkarolingischen Zeit für Tradition und Innovation im kirchlichen Recht*. Hannover: Hahnsche Buchhandlung, 2008.
- . "Probleme des geistliche Gerichts im 10. und 11. Jahrhundert: Bischöfe und Synoden als Richter im ostfränkischen-deutschen Reich." In *La giustizia nell'alto medioevo, secoli ix–xi*, 631–74.
- . "Rechtskenntnis und Rechtsverständnis bei den Laien des früheren Mittelalters." In *Aus Archiven und Bibliotheken. Festschrift für Raymund Kottje zum 65. Geburtstag*, 3 vols., edited by Hubert Mordek, 3.1–19. Frankfurt am Main: Peter Lang, 1992.
- . "Rhetorik und Dialektik in der Streitschriftenliteratur des 11./12. Jahrhunderts." In *Dialektik und Rhetorik im früheren und hohen Mittelalter. Rezeption, Überlieferung und gesellschaftliche Wirkung antiker Gelehrsamkeit vornehmlich im 9. und 12. Jahrhundert*, edited by Johannes Fried, 73–95. Munich: R. Oldenbourg Verlag, 1997.

- Haye, Thomas. *Lateinische Oralität. Gelehrte Sprache in der mündlichen Kommunikation des hohen und späten Mittelalters* Berlin: De Gruyter, 2005.
- Helmholz, Richard H. *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*. Oxford: Oxford University Press, 2004.
- . "Citations and the Construction of Procedural Law in the *Ius Commune*." In *The Creation of the Ius Commune*, 247–76.
- . "The Creation of a Canon Law of Prescription." In *Prescriptive Formality and Normative Rationality in Modern Legal Systems. Festschrift for Robert S. Summers*, edited by Werner Krawietz, et al., 265–83. Berlin: Duncker and Humblot, 1994.
- . "The Development of Law in the Classical and Early Medieval Europe: The Bible in the Service of the Canon Law." 70 *Chicago-Kent College of Law Review* (1995): 1557–81.
- . "Discipline of Clergy: Medieval and Modern." *Ecclesiastical Law Journal* 30.6 (2002): 191–96.
- . *Grundlagen des Rechts. Festschrift für Peter Landau zum 65. Geburtstag*, Paderborn and Munich: Schöningh, 2000.
- . "The *litis contestatio*: Its Survival in the Medieval *Ius Commune* and Beyond." In *Lex et Romanitas: Essays for Alan Watson*, edited by Michael Hoeflich, 73–90. Berkeley: The Robbins Collection, 2000.
- . "Money and Judges in the Law of the Medieval Church." *The University of Chicago Law School Roundtable* 8.2 (2001): 309–23.
- . *The Spirit of the Classical Canon Law*. Athens, GA: University of Georgia Press, 1996.
- . *The Ius Commune in England. Four Studies*. Oxford: Oxford University Press, 2001.
- Hermanowicz, Erika T. "Catholic Bishops and Appeals to the Imperial Court: A Legal Study of the Calama Riots in 408." *Journal of Early Christian Studies* 12.4 (2004): 481–521.
- Herrmann, Frank R. "The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure." *Virginia Journal of International Law* 36 (1995): 1–51.
- and Speer, Brownlow M. "Facing the Accuser. Ancient and Medieval Precursors of the Confrontation Clause." *Virginia Journal of International Law* 34 (1994): 481–552.
- Hirschmann, Stefan. "Der Fall Heinrichs von Ely (The Stechworth Case)—Zur Praxis päpstlicher Delegationsgerichtbarkeit um die Mitte des 12. Jahrhunderts." *ZRG KA* 89 (2003): 612–18.
- Hoeflich, Michael H. and Grabber, Jasonne M. "The Establishment of Normative Legal Texts. The Beginnings of the *Ius commune*." 1–21. In *The History of the Medieval Canon Law*.
- Hudson, John. "Court Cases and Legal Arguments in England, c. 1066–1166." *Transactions of the Royal Historical Society. Sixth Series*. 10 (2000): 91–116.

- . *The Formation of the English Common Law. Law and Society in England from the Norman Conquest to Magna Carta*. London and New York: Longman, 1996.
- . *Land, Law, and Lordship in Anglo-Norman England*. Oxford: Clarendon Press, 1994.
- Humfress, Caroline. "Bishops and Law Courts in Late Antiquity: How (Not) to Make Sense of the Legal Evidence." *Journal of Early Christian Studies* 19.3 (2011): 375–400.
- Hyams, Paul. "Due Process versus the Maintenance of Order in European Law: The Contribution of the *ius commune*." In *The Moral World of the Law*, edited by Peter Cross, 62–90. Cambridge: Cambridge University Press, 2000.
- James, Edward. "*Beati pacifici*: Bishops and the Law in Sixth-Century Gaul." In *Disputes and Settlement. Law and Human Relations in the West*, edited by John Bossy, 25–46. Cambridge: Cambridge University Press, 1983.
- Jaspers, Detlev and Fuhrmann, Horst. *Papal Letters in the Early Middle Ages*. Washington, D.C.: Catholic University of America Press, 2001.
- Jolowicz, H.F. and Nicholas, Barry. *Historical Introduction to the Study of Roman Law*, 3rd ed. Cambridge: Cambridge University Press, 1972.
- Kaiser, Wolfgang. "Zur hundertjährigen Verjährung zugunsten der römischen Kirche." *ZRG KA* 116 (1999): 60–103.
- Kalb, Herbert. "Rechtskraft und ihre Durchbrechungen im Spannungsfeld von kanonistischem und theologischem Diskurs (Rufinus-Stephan von Tournai-Johannes Faventinus)." In *Grundlagen des Rechts*, 405–19.
- . *Laesio enormis im Gelehrten Recht*. Vienna: Verband der Wissenschaften, 1992.
- . "Überlegungen zur Entstehung der Kanonistik als Rechtswissenschaft—Einige Aspekte." *Österreichisches Archiv für Kirchenrecht* 41 (1992): 6–10.
- Kantorowicz, Ernst. *The King's Two Bodies. A Study in Medieval Political Theology*. Princeton: Princeton University Press, 1957.
- Kantorowicz, Hermann. *The Definition of Law*. Cambridge: Cambridge University Press, 1958.
- . "The Poetical Sermon of a Medieval Jurist: Placentinus and his 'Sermo de Legibus'." *Journal of the Warburg Institute* 21 (1938): 22–41.
- . *Studies in the Glossators of the Roman Law. Newly Discovered Writings of the Twelfth Century*. Cambridge: Cambridge University Press, 1938.
- Kaser, Max. *Das römische Zivilprozeßrecht*, Munich: C.H. Beck, 1996.
- Kaster, Robert. *The Guardians of Language*. Berkeley and Los Angeles: The University of California Press, 1988.
- Kerff, Franz. "Das Würselener Sendgericht von der Karolingerzeit bis zum 16. Jahrhundert." In *Würselen. Beiträge zur Stadtgeschichte*, 2 vols., edited by Margret Wensky and Franz Kerff, 1.63–88. Cologne: Rheinland-Verlag, 1989.
- Kerner, Maximilian. "Johannes von Salisbury und das gelehrte Recht." In *Proceedings Munich*, 503–21.

- Kéry, Lotte. *Canonical Collections of the Early Middle Ages (ca. 400–1140). A Bibliographical Guide to the Manuscripts and Literature*. Washington: Catholic University of America Press, 1999.
- . *Gottesfurcht und irdische Strafe: Der Beitrag des mittelalterlichen Kirchenrechts zur Entstehung des öffentlichen Strafrechts*. Vienna, Cologne, Weimar: Böhlau Verlag, 2006.
- . "Canon Law and Criminal Law: The Results of a New Study." In *Proceedings Washington*, 407–22.
- Keyser, Richard. "'Agreement Supersedes Law, and Love Judgment.' Legal Flexibility and Amicable Settlement in Anglo-Norman England," *Law and History Review* 30.1 (2012): 37–88.
- Klauser, Theodor. "Bischöfe auf dem Richterstuhl." *Jahrbuch für Antike und Christentum* 5 (1962): 129–74.
- Klinck, Fabian. "Zur Bedeutung des Wortes Procurator in den Quellen des klassischen Rechts." *ZRG RA* 124 (2007): 25–52.
- Knox, Ronald G.G. "The Problem of Academic Language in Rufinus and Stephan." In *Proceedings Berkely*, 109–23.
- Knütel, Rolf. "Stipulatio und Pacta." in *Festschrift Max Kaser*, 201–28.
- Koziol, Geoffrey. *Begging Pardon and Favor. Ritual and Political Order in Early Medieval France*. Ithaca and London: Cornell University Press, 1992.
- Kuttner, Stephan. *Gratian and the Schools of Law*. London: Variorum, 1984.
- . *History of Ideas and Doctrines of Canon Law*. Aldershot: Ashgate, 1992.
- . "Marbod of Rennes on the "Ordo iudiciorum." *Nachrichten der Akademie der Wissenschaften in Göttingen: I. Philosophisch-Historische Klasse*, 1992 nr. 1 (Göttingen, 1992): 1–6.
- . *Proceedings of the Fourth International Congress of Medieval Canon Law: Toronto, 21–25 August, 1972*. Vatican City: Bibliotheca Apostolica Vaticana, 1976.
- . *Repertorium der Kanonistik. (1140–1234). Prodromus corpus glossatorum*. Vatican City: Bibliotheca Apostolica Vaticana, 1937.
- . "The Revival of Jurisprudence." In *Renaissance and Renewal in the Twelfth Century*, 299–323.
- and Pennington, Kenneth. *Proceedings of the Fifth International Congress of Medieval Canon Law: Salamanca, 21–25 September, 1976*. Vatican City: Bibliotheca Apostolica Vaticana, 1980.
- and Pennington, Kenneth. *Proceedings of the Sixth International Congress of Medieval Canon Law: Berkeley, 28 July–2 August, 1980*. Vatican City: Bibliotheca Apostolica Vaticana, 1985.
- and Rathbone, Eleanor. "Anglo-Norman canonists of the twelfth century: An introductory study." *Traditio* 7 (1949–1951): 279–358.
- and Ryan, J. Joseph. *Proceedings of the Second International Congress of Medieval Canon Law: Boston College, 12–16 August 1963*. Vatican City: Bibliotheca Apostolica Vaticana, 1965.

- Lamoreaux, John C. "Episcopal Courts in Late Antiquity." *Journal of Early Christian Studies*, 3.2 (1995): 143–67.
- Landau, Peter. "Die Anfänge der Prozesswissenschaft in der Kanonistik des 12. Jahrhunderts." In *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, 7–23.
- . "Die Anfänge der Verbreitung des klassischen kanonischen Rechts in Deutschland im 12. Jahrhundert und im ersten Drittel des 13. Jahrhunderts." In *Chiesa diritto e ordinamento della 'societas Christiana' nei secoli XI e XII*, 272–97. Milan: Vita e Pensiero, 1986.
- . "Die Anklagemöglichkeit Untergeordneter vom Dictatus Papae zum Dekret Gratians. Ein Beitrag zur Wirkungsgeschichte gregorianischen Rechtsdenken." In *Ministerium Iustitiae. Festschrift für Heribert Heinemann zur Vollendung des 60. Lebensjahres*, edited by André Gabriels and Heinrich J.F. Reinhardt, 373–83. Essen: Ludgerus Verlag, 1986.
- . "Der Begriff Ordo in der mittelalterlichen Kanonistik." in *Studien zum Prämonstratenserorden*, edited by Irene Cusius and Helmut Flachenecker, 185–200. Göttingen: Vandenhoeck and Ruprecht, 2003.
- . Das 'Dominium' der Laien an Kirchen im Decretum Gratiani und in vorgratianischen Kanonessammlungen der Reformzeit, *ZRG KA* 83 (1997): 209–21.
- . *Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa ordinaria*. Cologne and Vienna: Böhlau Verlag, 1966.
- . *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter*. Badenweiler: Bachmann, 2013.
- . "Frei und Unfrei in der Kanonistik des 12. und 13. Jahrhunderts am Beispiel der Ordination der Unfreien." In *Die abendländische Freiheit vom 10. zum 14. Jahrhundert. Der Wirkungszusammenhang von Idee und Wirklichkeit im europäischen Vergleich*, edited by Johannes Fried, 177–96. Sigmaringen: Jan Thorbecke Verlag, 1991.
- . "Gérard Pucelle und die Dekretsumme *Reverentia sacrorum canonum*: Zur Kölner Kanonistik im 12. Jahrhundert." In *Mélanges Anne Lefebvre-Teillard*, 623–38.
- . "Gratian and the *Decretum Gratiani*." In *The History of Medieval Canon Law*, 22–54.
- . "Die kirchliche Justizgewährung im Zeitalter der Reform in den Rechtssammlungen." In *La Giustizia nell' alto medioevo, secoli ix–xi*, 427–56.
- . "Die Rechtsstellung des Metropoliten in der Geschichte des Kirchenrechts." In *1200 Jahre Erzbistum Salzburg. Dom und Geschichte*, edited by Heinz Dopsch, et al., 521–42. Salzburg: Domkapitel zu Salzburg, 1998.
- . "Jurisprudenz und Fälschung in Köln im 12. Jahrhundert. Die Kölner Institutionenglosse." *Rivista Internazionale di Diritto Comune* 22 (2011): 9–33.
- . *Jus Patronatus. Studien zur Entwicklung des Patronats im Dekretalenrecht und der Kanonistik des 12. und 13. Jahrhunderts*. Vienna: Böhlau Verlag, 1975.
- . "The Origins of Civil Procedure. Treatises in Durham During the Twelfth Century." In *Canon Law, Religion, and Politics*, 136–43.

- . "The Origins of Legal Science in England in the Twelfth Century: Lincoln, Oxford, and the Career of Vacarius." In *Readers, Texts and Compilers*, 165–82.
- . "Ursprünge und Entwicklung des Verbotes doppelter Strafverfolgung wegen desselben Verbrechens in der Geschichte des kanonischen Rechts." *ZRG KA* 56 (1970): 124–56.
- . "Walter von Coutances und die Anfänge der anglo-normannischen Rechtswissenschaft." in *Panta rei*, 183–204.
- and Jörg Müller. *Proceedings of the Ninth International Congress of Medieval Canon Law: Munich, 13–18 July 1992*. Vatican City: Bibliotheca Apostolica Vaticana, 1997.
- Lange, Hermann and Kriechbaum, Maximiliane. *Römisches Recht im Mittelalter, vol. 2: Die Kommentatoren*. Munich: C.H. Beck, 2007.
- La giustizia nell'alto medioevo, secoli v–viii*. Spoleto: Centro di studi sull'alto medioevo, 1995.
- La giustizia nell'alto Medioevo, secoli ix–xi*. Spoleto: Centro di studi sull'alto medioevo, 1997.
- Lefebvre, Charles. "Contribution à l'étude des origines et développement de la denunciatio evangelica." *Ephemerides iuris canonici* 6 (1950): 60–93.
- Lemesle, Bruno. "Premiers jalons et mise en place d'une procédure d'enquête dans la région angevine (xi^e–xiii^e siècle)." In *La preuve en justice, de l'Antiquité à nos jours*, edited by Bruno Lemesle, 69–93. Rennes: Presses universitaires de Rennes, 2003.
- Lenski, Noel. "Evidence for the *Audientia episcopalis* in the New Letters of Augustine." In *Law, Society and Authority in Late Antiquity*, edited by Ralph Mathisen, 83–97. Oxford: Oxford University Press, 2001.
- Lepelley, L. Claude. "Liberté, colonat et esclavage d'après la Lettre 24* ; la juridiction épiscopale 'de liberi causa,'" *Les lettres de Saint Augustin découvertes par Johannes Divjak*, edited by Johannes Divjak, 329–42. Turnout: Brepols, 1983.
- Lepsius, Susanne. "Prätor und Prokonsul—Übersetzungsleistungen und Neuschöpfungen der mittelalterlichen Legisten im Umgang mit den römischen Ämtern." In *Science politique et droit public dans les facultés de droit européennes (XIII^e–XVIII^e siècle)*, edited by Jacques Krynen and Michel Stolleis, 223–50. Frankfurt am Main: V. Klostermann 2008.
- Levy, Ernst. *Gesammelte Schriften*, 2 vols., edited by Wolfgang Kunkel and Max Kaser. Cologne and Graz: Böhlau Verlag, 1963.
- Lévy, Philippe. *La Hiérarchie des preuves dans le droit savant du moyen-âge depuis la Renaissance du Droit Romain jusqu'à la fin du xiv^e siècle*. Paris: Librairie du Recueil Sirey, 1939.
- Linehan, Peter. *Proceedings of the Seventh International Congress of Medieval Canon Law: Cambridge, 23–27 July 1984*. Vatican City: Bibliotheca Apostolica Vaticana, 1988.
- Liotta, Fillippo. "Il testimone nel Decreto di Graziano." In *Proceedings Toronto*, 81–95.

- Litewski, Wieslaw. *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii*, 2 vols. Krakow: Jagiellonian University Press, 1999.
- . "Mündliche Klage und Klageschrift in den ältesten ordines iudicarii." In *Wirkungen europäischer Rechtskultur. Festschrift für Karl Kroeschell zum 70. Geburtstag*, edited by Gerhard Köbler and Hermann Nehlsen, 667–84. Munich: C.H. Beck, 1997.
- Lohrmann, Dietrich. "Papstprivileg und päpstliche Delegationsgerichtsbarkeit im nördlichen Frankreich zur Zeit der Kirchenreform." In *Proceedings Berkeley*, 535–50.
- Loschiavo, Lucca. "La Riforma gregoriana et la riemersione dell'Authenticum. Un 'ipotesi in cerca di conferma.'" In *Proceedings Esztergom*, 159–70.
- Lupoi, Maurizio. *The Origins of the European Legal Order*, trans. Adrian Belton. Cambridge: Cambridge University Press, 1999.
- McKitterick, Rosamond. *The Carolingians and the Written Word*. Cambridge: Cambridge University Press, 1989.
- . "Knowledge of Canon Law in the Frankish Kingdoms Before 789: The Manuscript Evidence." *Journal of Ecclesiastical History* 36 (1985): 97–117.
- Maitland, Frederick W. *The Constitutional History of England. A Course of Lectures Delivered by F.W. Maitland*, edited by H.A.L. Fisher. Cambridge: Cambridge University Press, 1908.
- . *Roman Canon Law in the Church of England. Six Essays*. London: Methuen, 1898.
- Mantello, Frank and Rigg, Arthur G. *Medieval Latin. An Introduction and Bibliographical Guide*. Washington, D.C. Catholic University of America Press, 1996.
- Mausen, Yves. "Per rerum naturam factum negantis probatio nulla sit. Le Problème de la preuve négative chez les glossateurs," in *Mélanges Anne Lefebvre-Teillard*, 695–706.
- . *Veritatis adiutor. La procédure du témoignage dans le droit savant et la pratique française (xii^e–xiv^e siècles)*. Milan. A. Giuffrè, 2006.
- Mayali, Laurent. "The Concept of Discretionary Punishment in Medieval Jurisprudence." In *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler*, 299–316.
- . "The Development of Law in Classical and Early Medieval Europe: Foreword: Social Practices, Legal Narrative, and the Development of the Legal Tradition." 70 *Chicago-Kent Law Rev.* (1995): 1469–77.
- . "Johannes Bassianus—Nachfolger des Vacarius in England?" *ZRG Rom. Abt.* 89 (1982): 317–25.
- Meens, Rob. "Sanctuary, Penance, and Dispute Settlement under Charlemagne: The Conflict between Alcuin and Theodulf of Orléans over a Sinful Cleric," *Speculum* 82.2 (2007): 277–300.
- Merdinger, Jane. "Malfeasance and Misdemeanors in St. Augustine's North Africa." In *Proceedings Washington*, 3–16.

- Metro, Antonio. "Unus Testis, Nullus Testis." In *Critical Studies in Ancient Law*, 109–16.
- Metzger, Ernest. "Roman Judges, Case Law, and Principles of Procedure." *Law and History Review* 22.2 (2004): 243–75, accessed at www.IusCivile.com on 15 July 2015.
- Meyer, Christoph. *Das Distinktionstechnik in der Kanonistik des 12. Jahrhunderts. Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters*. Louvain: Leuven University, 2000.
- Meyer-Spasche, Antonie. "The Recovery of Benefits Conferred under Illegal or Immoral Transactions. A Historical and Comparative Study with particular emphasis on the Law of Unjustified Enrichment." Ph.D. diss., University of Aberdeen, 2002.
- Milotić, Ivan. "An Outline of Arbitral Procedure in Roman Law." *Forum historiae iuris* accessed at <http://www.forhistiur.de/zitat/1301milotic.htm> on 15 July 2015.
- Milsom, S.F.C. "Law and Fact in Legal Judgment." *The University of Toronto Law Journal* 17.1 (1967): 1–19.
- . *A Natural History of the Common Law*. New York: Columbia University Press, 2003.
- Minnucci, Giovanni. "Diritto e processo penale nella prima trattatistica del XII secolo: qualche riflessione." In *Ins Wasser geworfen*, 581–608.
- Moore, Robert I. *The First European Revolution, c. 970–1215*. Oxford: Oxford University Press, 2004.
- Mordek, Hubert. "Der römische Primat in den kirchenrechtssammlungen des Westens vom iv. bis viii. Jahrhundert." In *Il primato del vescovo di Roma nel primo millennio*, edited by Michele Maccarrone, 523–66. Vatican City: Libreria Editrice Vaticana, 1998.
- . "Karolingische Kapitularien." In *Überlieferung und Geltung normativer Texte des frühen und hohen Mittelalters*, edited by Hubert Mordek, 25–50. Sigmaringen: Jan Thorbecke Verlag, 1986.
- Motzenbäcker, Rudolf. *Die Rechtsvermutung im kanonischen Recht*. Munich: Kommissionsverlag Karl Zink, 1958.
- Mousourakis, George. *The Historical and Institutional Context of Roman Law*. Aldershot: Ashgate, 2003.
- . *A Legal History of Rome*. New York: Routledge, 2007.
- Müller, Harald. "Entscheidungen auf Nachfrage. Die delegierten Richter als Verbindungsglieder zwischen Kurie und Region sowie als Gradmesser päpstlicher Autorität." In *Römisches Zentrum und kirchliche Peripherie. Das universale Papsttum als Bezugspunkt der Kirchen von den Reformpäpsten bis zu Innocenz III*, edited by Jochen Jorendt, et al., 109–31. Berlin: Walter DeGruyter, 2008.
- . *Päpstliche Delegationsgerichtsbarkeit in der Normandie (12. und frühes 13. Jahrhundert)*, 2 vols. Bonn: Bouvier Verlag, 1997.
- Müller, Wolfgang P. *Huguccio. The Life, Works, and Thought of a Twelfth-Century Jurist*. Washington: Catholic University of America Press, 1994.

- Müller, Wolfgang and Sommar, Mary. *Medieval Church Law and the Origins of the Western Legal Tradition. A Tribute to Kenneth Pennington*. Washington: Catholic University of America Press, 2004.
- . "The Recovery of Justinian's Digest in the Middle Ages." *BMCL NS* 20 (1990): 1–30.
- Murauer, Rainer. *Die Geistlichegerichtsbarkeit im Salzburger Eigenbistum Gurk*. Oldenbourg: Böhlau, 2009.
- Murray, Alexander Callander. "Pax et disciplina: Roman Public Law and the Merovingian State." In *Proceedings Syracuse*, 269–85.
- Nicolaj, Giovanna. "Originale, authenticum, publicum: Una sciarada per il documento diplomatico." In *Charters, Cartularies and Archives: The Preservation and Transmission of Documents in the Medieval West*, edited by Adam J. Kostko and Anders Winroth, 8–21. Toronto: University of Toronto Press, 1999.
- Nicholas, Barry. *An Introduction to Roman Law*. Oxford, Oxford University Press, 1962.
- Nipp, Renée. "The Dispute of Hariulf of Oudenburg and the Abbey of Saint Médard: A Convenient Confusion of Names." In *Media Latinitas. A Collection of Essays to Mark the Occasion of the Retirement of L.J. Engles*, ed. R.I.A. Nipp, et al., 275–80. Turnhout: Brepols, 1996.
- Nörr, Dieter. *Die Entstehung der longi temporis praescriptio. Studien zum Einfluß der Zeit im Recht und zur Rechtspolitik in der Kaiserzeit*. Cologne and Opladen: Westdeutscher Verlag, 1969.
- Nörr, Knut Wolfgang. "Institutional Foundations of the New Jurisprudence." In *Renaissance and Renewal in the Twelfth Century*, 324–38.
- . "On the Early History of *prima facie*. Evidence in German Law." In *The Law of Presumptions: Essays in Comparative Legal History*, edited by Richard H. Helmholz and W. David H. Sellar, 73–84. Berlin: Duncker and Humblot, 2009.
- . "Päpstliche Dekretalen in den *ordines iudiciorum* der frühen Legistik." *Ius Commune* 3 (1970): 1–9.
- . "Päpstliche Dekretalen und römisch-kanonischer Zivilprozeß." In *Studien zur europäischen Rechtsgeschichte*, edited by Walter Wilhelm, 43–65. Frankfurt am Main: V. Klostermann, 1972.
- . *Romanisch-Kanonisches Prozessrecht: Erkenntnisverfahren Erster Instanz in Civilibus*. Berlin: Springer Verlag, 2012.
- . "Zum institutionellen Rahmen der gelehrten Rechte im 12. Jahrhundert." In *Aspekte europäischer Rechtsgeschichte. Festgabe für Helmut Coing zum 70. Geburtstag*, edited by C. Bergfeld et al., 233–44. Frankfurt am Main: V. Klostermann, 1982.
- . *Zur Stellung des Richters in gelehrten Prozess der Frühzeit: iudex secundum allegata non secundum conscientiam iudicat*. Munich: C.H. Beck, 1967.

- . “Zur Frage des subjectiven Rechts in der mittelalterlichen Rechtswissenschaft.” In *Festschrift für Hermann Lange*, edited by Dieter Medicus, et al., 193–204. Stuttgart, Berlin, Cologne: W. Kohlhammer, 1992.
- Noethlichs, Sara. “Das päpstliche Konsistorium im Spiegel der Quellen des 11. bis 13. Jahrhunderts.” *ZRG KA* 94.1 (2008): 272–87.
- O'Brien, Bruce. “An English Book of Laws from the Time of Glanvill.” In *Laws, Lawyers, and Texts. Studies in Medieval Legal History in Honour of Paul Brand*, edited by Susanne Jenks, et al., 51–68. Leiden and Boston 2012.
- Otte, Gerhard. *Dialektik und Jurisprudenz. Untersuchungen zur Methode der Glossatoren*. Frankfurt am Main: V. Klostermann, 1981.
- . “Logische Einteilungstechniken bei den Glossatoren des römischen Rechts.” In *Dialektik und Rhetorik im frühen und hohen Mittelalter*, 133–55.
- Padoa-Schioppa, Antonio. “Grégoire le Grand dans son rôle de judge.” In *Mélanges d'Anne Lefebvre-Teillard*, 801–12.
- . “Il ruola della cultura giuridica in alcuni atti giudiziari italiani dei secoli xi e xii.” *Nuova rivista storica* 64 (1980): 265–85.
- . “Le Rôle du droit savant dans quelques actes judiciaires italiens des xi^e et xii^e siècles.” In *Confluence des droits savants et des pratiques juridiques*, 343–71. Milan: Dott. A. Giuffrè, 1979.
- . “Sul principio della rappresentanza diretta nel Diritto canonico classico.” In *Proceedings Toronto*, 107–31.
- Palmer, Robert. *English Legal History Materials* accessed at <http://vi.uh.edu/pages/bob/elhone/elh1a.html> on 15 July 2015.
- Pennington, Kenneth. “The ‘Big Bang’: Roman Law in the Early Twelfth Century.” *Rivista internazionale di diritto comune* 18 (2007): 43–70 accessed at <http://faculty.cua.edu/pennington/BigBangRomanLaw.htm> on 15 July 2015.
- . “The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The *Authenticae*.” *Rivista Internazionale di Diritto Comune* 22 (2011): 35–53, accessed at <http://faculty.cua.edu/pennington/Law508/PenningtonAuthenticaeRIDC2011.pdf> on 15 July 2015.
- . *The Prince and the Law 1200–1600. Sovereignty and Rights in the Western Legal Tradition*. Berkeley and Los Angeles: University of California Press, 1993.
- . “The Practical Use of Roman Law in the Early Twelfth Century.” In *Handlung und Wissenschaft. Die Epistemologie der praktischen Wissenschaften im 13. und 14. Jahrhundert*, edited by Matthias Lutz-Bachmann and Alexander Fidora, 11–32. Berlin: Akademie Verlag, 2008.
- . “Roman and Secular Law.” In *Medieval Latin*, 254–66.
- . “Roman Law at the Papal Curia in the Early Twelfth Century.” In *Canon Law, Religion and Politics. Liber Amicorum Robert Somerville*, edited by Uta-Renate Blumenthal, et al., 233–52. Washington: Catholic University of America Press, 2012.

- . "Torture in the *Ius Commune*." In *Mélanges Anne Lefebvre-Teillard*, 813–38.
- and Hartmann, Wilfried. *The History of the Medieval Canon Law in the Classical Period, 1140–1234. From Gratian to the Decretals of Pope Gregory IX*. Washington: Catholic University of America Press, 2008.
- and Müller, Wolfgang. "The Decretists: The Italian School." In *The History of Medieval Canon Law*, 121–173.
- and Chodorow, Stanley, Kendall, Keith H. *Proceedings of the Tenth International Congress of Medieval Canon Law: Syracuse, NY. 13–18 August 1996*. Vatican City: Bibliotheca Apostolica Vaticana, 2001.
- Philpott, Mark. "'In primis . . . omnis humanae prudentiae inscius et expers putaretur': St. Anselm's Knowledge of Canon Law." In *Anselm. Aosta, Bec and Canterbury. Papers in Commemoration of the Nine-Hundredth Anniversary of Anselm's Enthronement as Archbishop, 25 September 1093*, edited by D.E. Luscombe and G.R. Evans. 94–105. Sheffield: Sheffield Academic Press, 1996.
- Piekenbrock, Andreas. *Befristung, Verjährung, Verschweigung Und Verwirkung: Eine Rechtsvergleichende Grundlagenstudie zu Rechtsänderungen durch Zeitablauf*. Tübingen: Mohr Siebeck Verlag, 2006.
- Plessis, J. du. "Towards the Medieval Law of Hypothec." In *The Creation of the Ius Commune*, 159–74.
- Post, Gaines. "Plena Potestas and Consent in Medieval Assemblies." *Traditio* 1 (1943): 356–64.
- . "Roman Law and Early Representation in Italy and Spain, 1150–1250." *Speculum* 18.2 (1943): 211–32.
- . *Studies in Medieval Legal Thought. Public Law and the State, 1100–1322*. Princeton: Princeton University Press, 1964.
- Radding, Charles. "Legal Theory and Practice in Eleventh-Century Italy." *Law and History Review* 21.2 (2003): 377–81.
- . *The Origins of Medieval Jurisprudence: Pavia and Bologna, 850–1150*. New Haven and London: Yale University Press, 1988.
- . "Petre te appellat martinus. Eleventh-Century Judicial Procedure as Seen Through the Glosses of Walcausus." in *La Giustizia nell' alto medioevo secoli ix–xi*, 827–61.
- and Ciaralli, Antonio. *The Corpus Iuris Civilis in the Middle Ages: Manuscripts And Transmission from the Sixth Century to the Juristic Revival*, Leiden and Boston: Brill, 2007.
- Rebillard, Éric and Sotinel, Claire. *L'évêque dans la cité. Image et autorité. Actes de la table ronde (Rome 1er-2 décembre 1995)*. Rome: Collection de l'École française de Rome, 1998.
- Rennie, Kriston. *The Foundations of Medieval Papal Legation*. London: Palgrave-Macmillan, 2013.

- . *Law and Practice in the Age of Reform. The Legatine Work of Hugh of Die (1073–1106)*. Turnhout: Brepols, 2010.
- Reynolds, Susan. "The Emergence of Professional Law in the Long Twelfth Century." *Law and History Review* 21.2 (2003): 347–66.
- . "Rationality and Collective Judgment in the Law of Western Europe Before the Twelfth Century." *Quaestiones medii aevi novae* 5 (2000): 3–19.
- Rhee, C.H. van. "The Role of Exceptions in Continental Civil Procedure." In: *Adventures of the Law. Proceedings of the Sixteenth British Legal History Conference*, edited by Paul Brand, et al., 88–105. Dublin: Four Courts Press, 2005.
- Rio, Alice. "Formulae, Legal Practice and the Settlement of Disputes in the Frankish Kingdoms: The Formulary of Angers." In *Law Before Gratian. Law in Western Europe c. 500–1100. Proceedings of the Third Carlsberg Academy Conference on Medieval Legal History, 2006*, ed. Per Andersen et al. Copenhagen: DJØF Publishing, 2007.
- . *Legal Practice and the Written Word in the Early Middle Ages*. Cambridge: Cambridge University Press 2009.
- Robinson, O.F. *The Criminal Law of Ancient Rome*. London and Baltimore: Johns Hopkins University Press, 1995.
- Rolker, Christof. *Canon Law and the Letters of Ivo of Chartres*. Cambridge: Cambridge University Press, 2010.
- . "Ivo of Chartres' Pastoral Canon Law." *BMCL NS* 25 (2002–2003): 114–45.
- Rosalio, José and Castillo, Laura. *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler*. Rome: LAS, 1992.
- Roumy, Franck. "Le développement du système de l'avocat commis d'office dans la procédure romano-canonique (xii^e–xiv^e siècle)." *TRG* 71 (2003): 359–86.
- . "Excerpta Rotomagensia un des plus anciens témoignages de la diffusion du droit de justinien en France au xii^e siècle." In *Mélanges Anne Lefebvre-Teillard*, 917–47.
- . "L'ignorance du droit dans la doctrine civiliste des xii^e–xiii^e siècles." *Cahiers de recherches médiévales et humanistes*, 7 (2000), accessed at <http://crm.revues.org/878> on 15 July 2015.
- Rufner, Thomas. "Die gesetzgleiche Geltung des kanonischen Rechts in der Spätantike." *ZRG KA* 96 (2010): 1–37.
- Savigny, Carl Friedrich von. *Geschichte des römischen Rechts im Mittelalter*, 5th ed., 7 vols. Heidelberg 1834–44, rp. Aalen: Scientia Verlag, 1986.
- Sayers, Jane. *Papal Judges Delegate in the Province of Canterbury 1198–1254. A Study in Ecclesiastical Jurisdiction and Administration*. Oxford: Oxford University Press, 1997.
- Schermaier, Martin Josef. "Bona fides in Roman Contract Law." In *Good Faith*, 77–83.
- Schieffer, Rudolf. *Die Streitschriften Hinkmars von Reims und Hinkmars von Laon, 869–871*. Hannover: Hahnsche Buchhandlung, 2003.

- . "The Papal Revolution in Law"? Rückfragen an Harold J. Berman." *BMCL NS* 22 (1998): 19–30.
- Schlinker, Steffen. *Litis contestatio. Eine Untersuchung über die Grundlagen des gelehrten Zivilprozesses in der Zeit vom 13. bis zum 19. Jahrhundert*. Frankfurt am Main: V. Klostermann, 2008.
- Schmoeckel, Matthias. *Humanität und Staatsraison. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinsamen Strafprozeß- und Beweisrechts seit dem hohen Mittelalter*. Vienna: Böhlau, 2000.
- . "Nicholaus I und das Beweisrecht im 9. Jahrhundert." In *Grundlagen des Rechts*, 53–76. Paderborn and Munich: Schöningh, 2000.
- . "Procedure, Proof, and Evidence." In *Christianity and Law: An Introduction*, edited by John Witte, Jr. and Frank S. Alexander, 143–62. Cambridge: Cambridge University Press, 2008.
- Schon, Karl-Georg. *Die Capitula Angilramni. Eine prozessrechtliche Fälschung Pseudo-isidors*. Hannover: Hahnsche Buchhandlung, 2006.
- Schrage, Eltjo. "Descendit ad Infernos: And Belial Sued Jesus Christ for Trespass." In *Critical Studies in Ancient Law*, 353–65.
- . "*Iudex Bonus Vir Dicitur*." In *Miscellanea Dominico Maffei*, 277–95.
- and Dondorp, Harry. *Utrumque Ius. Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts*. Berlin: Duncker and Humblot, 1992.
- Schwartz, Stefan Tobias. *Qui tacet, consentire videtur—eine Rechtsregel im Kommentar. Vorläufer in kanonistischen Brocardasammlungen und zeitgenössische Kommentierung*. Paderborn: Schöningh, 2003.
- Siems, Harald. "Adsimilare. Die Analogie als Wegbereiterin zur mittelalterlichen Rechtswissenschaft." In *Europa an der Wende vom 11. Zum 12. Jahrhundert. Beiträge zu Ehren von Werner Goetz*, edited by Klaus Herbers, 143–70. Stuttgart: Steiner, 2001.
- . "Bestechliche und ungerechte Richter in frühmittelalterlichen Rechtsquellen." In *La giustizia nell'alto medioevo, secoli v–viii*, 509–67.
- . "In ordine posuimus. Begrifflichkeit und Rechtsanwendung in Reginos Sendhandbuch." In *Recht und Gericht in Kirche und Welt um 900*, edited by Wilfried Hartmann and Annette Grabowsky, 67–90. Munich: R. Oldenbourg Verlag, 2007.
- Snow, Vernon F. "The Evolution of Proctorial Representation in Medieval England." *The America Journal of Legal History* 7.4 (1963): 319–39.
- Sohm, Rudolf. *Das Altkatholische Kirchenrecht und das Dekret Gratians*. Munich and Leipzig: Duncker and Humblot, 1918, rp. Darmstadt: Wissenschaftliche Buchgesellschaft, 1967.
- Southern, Richard W. *Scholastic Humanism and the Unification of Europe*, vol. 1. Cambridge, MA: Harvard University Press, 1995.
- Stapleton, Caitlin. "The Legal Legacy of Pope Gregory I: In Life and in Letters." 9 *Ave Maria Law Review* (2011): 303–33.

- Stein, Peter. *Regulae Iuris: From Legal Rules to Legal Maxims*. Edinburgh: University Press, 1966.
- . *Roman Law in European History*. Cambridge: Cambridge University Press, 1999.
- Stelzer, Wilfried. *Gelehrtes Recht in Österreich. Von den Anfängen bis zum frühen 14. Jahrhundert*. Vienna: H. Böhlau, 1982.
- Taliadoros, Jason. "Law and Theology in Gilbert of Foliot's (c. 1105/10–1187/88) Correspondence." *Haskins Society Journal* 16 (2006): 77–94.
- . *Law and Theology in Twelfth-Century England. The Works of Master Vacarius (c. 115/1120–c. 1200)*. Turnhout: Brepols, 2006.
- . "Synthesizing the Legal and Theological Thought of Master Vacarius." *ZRG KA* 95 (2009): 48–77.
- Tate, Joshua C. "Ownership and Possession in the Early Common Law." *The American Journal of Legal History* 48.3 (2006): 280–313.
- Teske, Gunnar. "Ein neuer Text des Bulgarus-Briefes an den römischen Kanzler Haimeric. Zugleich ein Beitrag zum Verhältnis von Saint-Victor in Paris zur Kurie." In *Vinculum Societatis. Joachim Wollasch zum 60. Geburtstag*, edited by Franz Neiske, et al., 302–13. Sigmaringen: Glock and Lutz, 1991.
- Turner, Ralph V. "The Judges of King John: Their Background and Training." *Speculum* 51.3 (1976): 447–61.
- Uelmen, Amelia J. "Symposium: The Legal Profession Looking Backward: A View of the Legal Profession from a Mid-Twelfth-Century Monastery." 71 *Fordham Law Review* (2003): 1517–41.
- Ullmann, Walter. *The Church and the Law in the Earlier Middle Ages*. London: Variorum, 1975.
- . *Growth of Papal Government in the Middle Ages*. London: Methuen, 1955.
- . *Jurisprudence in the Middle Ages*. London: Variorum, 1980.
- Vindogradoff, Paul. *Roman Law in Medieval Europe*, 3rd ed. Oxford: Clarendon, 1929.
- Vismara, Giulio. *Episcopalis audientia, l'attività, giurisdizionale del vescovo per la risoluzione delle controversie private tra laici nel diritto romano e nella storia del diritto italiano fino al secolo nono*. Milan: Società Vita e pensiero, 1937.
- Waldstein, Wolfgang. "Zur Stellung des Episcopalis audientia im spätrömischen Prozeß." In *Festschrift für Max Kaser zum 70. Geburtstag*, edited by Dieter Medicus and Hans Hermann Silber, 533–56. Munich: C.H. Beck, 1976.
- Wallinga, Tammo. "Authenticum and Authenticae—What's in a Name? References to Justinian's Novels in Medieval Manuscripts," *TRG* 77 (2009): 43–59.
- . *The Casus Codicis of Wilhelmus de Cabriano*. Frankfurt-am-Main: V. Klostermann, 2005.
- Watson, Alan. *Contract of Mandate in Roman Law*. Oxford: Oxford University Press, 1961.

- . "Legal Change: Sources of Law and Legal Culture." *University of Pennsylvania Law Review* 131.5 (1983): 1121–57.
- Weigand, Rudolf. "Die anglo-normanische Kanonistik in den letzten Jahrzehnten des 12. Jahrhunderts," In *Proceedings Cambridge*, 249–63.
- . *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus*. Munich: Hübner 1967.
- . "Die Rechtslehre der Scholastik bei den Dekretisten und Dekretalisten." In *La Norma en el derecho canonica*, 2 vols., 1.106–10. Pamplona: Ediciones Universidad de Navarra, 1979.
- . "The Transmontane Decretists." In *The History of Medieval Canon Law*, 174–210.
- Weimar, Peter. "Die legistische Literatur und die Methode des Rechtsunterrichts der Glossatorenzeit." In Coing, *Handbuch*, 1.158–59.
- West, Charles. "The Significance of the Carolingian Advocate," *Early Medieval Europe* 17.2 (2009): 186–206.
- White, Stephen D. *Feuding and Peace-Making in Eleventh-Century France*. Aldershot: Ashgate, 2005.
- . "Inheritances and Legal Arguments in Western France, 1050–1150." *Traditio* 43 (1987): 44–103.
- . "Pactum . . . legem vincit et amor iudicium." The Settlement of Disputes by Compromise in Eleventh-Century Western France." *American Journal of Legal History* 22 (1978): 281–308.
- . "Proposing the Ordeal and Avoiding It: Strategy and Power in Western French Litigation, 1050–1150." In *Cultures of Power: Lordship, Status and Process in Twelfth-Century Europe*, edited by Thomas N. Bisson, 89–123. Philadelphia: University of Philadelphia Press, 1995.
- Whitman, James Q. *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial*. New Haven and London: Yale University Press, 2008.
- Wickham, Chris. *Courts and Conflict in Twelfth-Century Tuscany*. Oxford: Oxford University Press, 2004.
- Wiegand, Wolfgang. *Plus Petitio*. Berlin: Gremer, 1974.
- Witt, Ronald G. *The Two Latin Cultures and the Foundation of Renaissance Humanism in Medieval Italy*. Cambridge: Cambridge University Press, 2012.
- Winroth, Anders. *The Making of Gratian's Decretum*. Cambridge: Cambridge University Press, 2004.
- . "Law Schools in the Twelfth Century." In *Mélanges Anne Lefebvre-Teillard*, 1057–64.
- . "Roman Law and the *Panormia*." In *Bishops, Texts, and the Use of Canon Law Around 1100*, 183–90.
- . "The Teaching of Law in the Twelfth Century." In *Law and Learning*, 41–62.

- Wormald, Patrick. *The Making of English Law: King Alfred to the Twelfth Century. Legislation and its Limits*. Oxford: Wiley Blackwell, 1999, rp. 2001.
- Zimmermann, Harald. "Römische und kanonistische Rechtskenntnis und Rechtsschulung im frühen Mittelalter." In: *La scuola nell'occidente latino nell'alto medioevo*, 767–94. Spoleto: Centro di studi sull'alto medioevo, 1972.
- Zimmermann, Reinhard and Whittaker, Simon. *Good Faith in European Contract Law*. Cambridge: Cambridge University Press, 2008.
- Zuleta, Francis and Stein, Peter. *The Teaching of Roman Law in England Around 1200*. London: Selden Society, 1990.
- Zutshi, Patrick. "Petitioners, Popes, Proctors: The Development of Curial Institutions, c. 1150–1250." In *Pensiero e sperimentazioni istituzioni nella 'societas Christiana' (1046–1250)*, edited by Giancarlo Andenna, 265–93. Milan: Vita e pensiero, 2007.

Index of Sources and Parallels

Classical Authors

Sallust, *Bellum Iugurthinum* 62 n. 49

Christian Authors

Augustine, *Tractatus In
evangelium Iohannis* 242 n. 351
Jerome, *Contra Vigilantium* 74 n. 92
Leo the Great, *Sermo 22* 235 n. 288

Civil Law

Digest

Dig. 1.5.4 168 n. 392
Dig. 1.8.1pr 105 n. 137
Dig. 1.18.3 255 n. 459
Dig. 1.18.19pr 255 n. 460
Dig. 1.18.19.1 256 n. 462
Dig. 1.21.1.1 165 n. 369
Dig. 2.1.5 165 n. 371
Dig. 2.1.10 166 n. 378
Dig. 2.4.1 134 n. 127
Dig. 2.4.4.1 206 n. 49
Dig. 2.5.1 140 n. 169
Dig. 2.8.1 138 n. 159
Dig. 2.8.2 138 n. 160
Dig. 2.8.7.1 139 n. 161
Dig. 2.8.15pr 140 n. 171
Dig. 2.11.2.3 138 n. 156
Dig. 2.12.1pr 207 n. 55, 210
Dig. 2.12.10 151 n. 248
Dig. 2.13.1pr 132 n. 118
Dig. 2.13.1.3 133 n. 124
Dig. 2.14.7.4 158 n. 312
Dig. 2.14.27 145 n. 207
Dig. 2.14.27.4 158 n. 311
Dig. 3.1.1.2 148 n. 227
Dig. 3.1.2 87 n. 154
Dig. 3.1.4 149 n. 236
Dig. 3.2 89 n. 172
Dig. 3.3§2 190 n. 148
Dig. 3.3.41 190 n. 154

Dig. 3.3.43.4 139 n. 164
Dig. 3.3.43.5 (4) 140 n. 166
Dig. 3.3.54pr 190 n. 153
Dig. 4.4.25.1 269 n. 575
Dig. 4.6.26.4 55 n. 14
Dig. 4.8.7pr 260 n. 500
Dig. 4.8.9.2 88 n. 170
Dig. 4.8.17.7 164 n. 368
Dig. 5.1.2§3 191 n. 157
Dig. 5.1.2§4 191 n. 158
Dig. 5.1.7 140 n. 170
Dig. 5.1.19.1 193 n. 172
Dig. 5.1.21 151 n. 252
Dig. 5.1.29 142 n. 183,
229 n. 226
Dig. 5.1.47 166 n. 374
Dig. 5.1.53 97 n. 248
Dig. 5.1.54 142 n. 186
Dig. 5.1.72 134 n. 130
Dig. 5.1.73.2 135 n. 137
Dig. 5.1.73.3 137 n. 154
Dig. 5.1.77 166 n. 379
Dig. 9.1.1pr 193 n. 176
Dig. 9.2.2pr 193 n. 175
Dig. 10.2.18.2 108 n. 351
Dig. 12.2.1 156 n. 296
Dig. 12.2.3 157 n. 303
Dig. 12.2.34.2 269 n. 577
Dig. 12.2.38 157 n. 306
Dig. 12.5.1 158 n. 311
Dig. 12.5.1.2 108 n. 344
Dig. 13.3.3 138 n. 157
Dig. 13.4.0 235 n. 283
Dig. 13.4.7pr 184 n. 97
Dig. 17.1.6.3 108 n. 343
Dig. 22.3.2 152, 249 n. 411
Dig. 22.3.9 233 n. 269
Dig. 22.3.19 92 n. 198
Dig. 22.5.1pr 153 n. 264
Dig. 22.5.1.1 152 n. 262
Dig. 22.5.2 96 n. 237,
153 n. 265
Dig. 22.5.3pr 96 nn. 235, 241,
153 n. 267
Dig. 22.5.3 96 n. 238

Dig. 22.5.3§2	96 n. 243	Dig. 49.1.1.4	168 n. 394
Dig. 22.5.3.1	96 n. 242	Dig. 49.1.4.2	99 n. 273
Dig. 22.5.3.2	153 n. 269	Dig. 49.1.5pr	99 n. 274
Dig. 22.5.3.5	95 n. 233	Dig. 49.1.5.4	100 n. 280
Dig. 22.5.3.6	154 n. 274	Dig. 49.2.1.3	169 n. 401
Dig. 22.5.4	95 n. 230	Dig. 49.3.1.1	165 n. 370
Dig. 22.5.6	154 n. 278	Dig. 49.6.1.1	170 n. 409
Dig. 22.5.8	93 n. 206, 95 n. 228	Dig. 49.6.1.2	170 n. 410
Dig. 22.5.10	153 n. 270	Dig. 49.6.1pr	170
Dig. 22.5.12	154 n. 281	Dig. 49.8.1.2	100 n. 277
Dig. 22.5.21pr	96 n. 236, 97 n. 246	Dig. 49.8.1.3	161 n. 334
Dig. 22.5.21.1	93 n. 207, 97 n. 250	Dig. 49.11.1	170 n. 406
Dig. 22.5.21.2	97 n. 245	Dig. 50.16.106	170
Dig. 22.5.23	153 n. 271	Dig. 50.17.1	104 n. 312
Dig. 22.5.24	153 n. 272	Dig. 50.17.2pr	109 n. 352
Dig. 22.5.25	97 n. 259	Dig. 50.17.3	109 n. 355
Dig. 28.2.25pr	194 n. 183	Dig. 50.17.4	109 n. 358
Dig. 37.6.1pr	108 n. 348	Dig. 50.17.7	109 n. 359
Dig. 39.6.27	108 n. 350	Dig. 50.17.9	110 n. 362
Dig. 41.2.10.1	135 n. 134	Dig. 50.17.27	110 n. 366
Dig. 42.1.6.2	162 n. 347	Dig. 50.17.29	110 n. 369
Dig. 42.1.39	163 n. 351	Dig. 50.17.60	109 n. 356
Dig. 42.1.53pr	102 n. 298, 163 n. 352	Dig. 50.17.125	92 n. 196
Dig. 42.1.53.1	102 n. 297	Dig. 50.17.207	90 n. 187
Dig. 42.1.53.2	102 n. 299		
Dig. 42.1.55	163 n. 353	<i>Codex</i>	
Dig. 42.1.56	164 n. 360	Cod. 1.1.8.19	105 n. 321
Dig. 42.1.63	163 n. 354	Cod. 1.3.51pr	228 n. 223
Dig. 42.2.6.3	164 n. 361	Cod. 1.4.27.3	87 n. 158
Dig. 44.1.1	91 n. 192, 144 n. 199	Cod. 1.9.8.2	162 n. 349
Dig. 44.1.2pr	144 n. 200	Cod. 1.19.3	169 n. 402
Dig. 44.1.2.1	93 n. 203	Cod. 1.19.7	156 n. 291
Dig. 44.1.3	145 n. 206	Cod. 1.22.0	156 n. 292
Dig. 44.1.7	145 n. 209	Cod. 1.23.1	155 n. 287
Dig. 44.4.1.7.1	145 n. 209	Cod. 1.23.3	156 n. 289
Dig. 46.3.12.4	139 n. 165	Cod. 1.23.4	156 n. 290
Dig. 46.8.1	139 n. 162	Cod. 1.23.7pr	155 n. 285
Dig. 46.8.8	139 n. 162	Cod. 1.23.7	155 n. 286
Dig. 48.2.3.1	94 n. 221	Cod. 1.4.27.3	132 n. 120
Dig. 48.2.3pr	95 n. 224	Cod. 2.0	157 n. 298
Dig. 48.2.4	94 n. 213	Cod. 2.1.3	132 n. 120
Dig. 48.2.7pr	94 n. 222	Cod. 2.1.4	92 n. 195
Dig. 48.2.8	93 n. 209	Cod. 2.3.6	158 n. 310
Dig. 48.2.9	94 n. 210	Cod. 2.3.10	158 n. 312
Dig. 48.2.10	94 n. 211	Cod. 2.4.18	159 nn. 321–322
Dig. 48.2.11pr	94 n. 212	Cod. 2.4.20	160 n. 323
Dig. 48.12.2pr	94 n. 218	Cod. 2.4.38	159 n. 319
Dig. 48.18.10.1	94 n. 217	Cod. 2.4.42	160 n. 327, 163 n. 358

Codex (cont.)

Cod. 2.6.6pr	149 n. 234	Cod. 3.19.2	151 n. 250
Cod. 2.6.6	149 n. 232	Cod. 3.19.2.1	1, 151 n. 251
Cod. 2.6.6.1	148 n. 226	Cod. 3.19.3	140 n. 167, 250 n. 417
Cod. 2.6.7.1	149 n. 238	Cod. 3.28.37.1d	109 n. 360
Cod. 2.6.7.3	150 n. 239	Cod. 3.31.11	152 n. 259
Cod. 2.7.1	150 n. 240, 163 n. 259	Cod. 4.1.2	157 n. 301
Cod. 2.7.14	148 n. 229	Cod. 4.1.11pr	157 n. 304
Cod. 2.9.1	150 n. 241	Cod. 4.1.12.2	268 n. 570
Cod. 2.9.2	150 n. 243	Cod. 4.7.0	107 n. 341
Cod. 2.9.3	150 n. 242	Cod. 4.19.2	152 n. 258
Cod. 2.10.1	90 n. 185	Cod. 4.19.5	152 n. 261
Cod. 2.12.1	139 n. 165	Cod. 4.19.8	152 n. 257
Cod. 2.12.2.4	98 n. 262	Cod. 4.19.19	145 n. 211
Cod. 2.27.1	268	Cod. 4.19.23	104 n. 313, 152 n. 260
Cod. 2.46.0	140 n. 268	Cod. 4.19.25	152 n. 254
Cod. 2.55.1	164 n. 265	Cod. 4.20.4	152
Cod. 2.58.0	140 n. 172	Cod. 4.20.5	154 n. 278
Cod. 2.58.1pr	140 n. 174	Cod. 4.20.9	155 n. 283, 240 n. 335
Cod. 2.58.2pr	140 n. 173	Cod. 4.21.18	154 n. 276, 249
Cod. 2.58.2.1	141 n. 180	Cod. 4.30.3	92 n. 199
Cod. 2.58.2.6	141 n. 178	Cod. 4.34.10	237 n. 307
Cod. 2.58.2.7	141 n. 179	Cod. 5.2.1	106 n. 332
Cod. 3.1.5	165 n. 372	Cod. 5.71.7	107 n. 335
Cod. 3.1.13pr	98 n. 263, 136 n. 140	Cod. 7.35.5	184 n. 98
Cod. 3.1.13.1	136 n. 140	Cod. 7.39.0	146 n. 214
Cod. 3.1.13.2	136 n. 145	Cod. 7.40.2.1	147 n. 221
Cod. 3.1.13.2a	136 n. 148	Cod. 7.43.2	161 n. 335
Cod. 3.1.13.2b	137 n. 151	Cod. 7.43.7	161 n. 336
Cod. 3.1.13.2c	137 n. 153	Cod. 7.45.6	161 n. 338
Cod. 3.1.13.3	163 n. 138	Cod. 7.45.14	161 n. 340
Cod. 3.1.13.4	226 n. 211, 253 n. 445	Cod. 7.48.3	162 n. 343
Cod. 3.1.13.5	173 n. 150	Cod. 7.48.4	162 n. 342
Cod. 3.1.13.6	162 n. 345	Cod. 7.49.1	141 n. 177
Cod. 3.1.13.8	136 n. 142	Cod. 7.49.2	103 n. 309
Cod. 3.1.14	89 n. 142	Cod. 7.51.2	162 n. 346
Cod. 3.1.14.2	254 n. 451	Cod. 7.54.3pr	164 n. 362
Cod. 3.1.15	167 n. 380	Cod. 7.54.3.3	88 n. 162
Cod. 3.1.16	167 n. 383	Cod. 7.58.2	163 n. 358
Cod. 3.3.2pr	98 n. 261	Cod. 7.62.2	170 n. 412
Cod. 3.3.2.1	98 n. 260	Cod. 7.62.3	179 n. 403
Cod. 3.5.1	166 n. 375	Cod. 7.62.6.6	170 n. 411
Cod. 3.11.1	151 n. 247	Cod. 7.62.19pr	103 n. 307
Cod. 3.11.2.2	151 n. 246	Cod. 7.62.28	170 n. 405
Cod. 3.12.0	192 n. 165	Cod. 7.63.2.1	101 n. 285
Cod. 3.13.2	140 n. 167, 250 n. 417	Cod. 7.63.2.2	101 n. 285
Cod. 3.13.3	164 n. 364	Cod. 7.63.5.1a	101 n. 284
Cod. 3.14.0	154 n. 277	Cod. 7.64.3	103 n. 303
Cod. 3.18.0	235 n. 283	Cod. 7.65.2pr	102 n. 295
		Cod. 7.65.8	103 n. 306

Cod. 7.69.1	100 n. 282, 103 n. 304	D 50 c. 21	211
Cod. 8.5.2	161 n. 333	D 54 c. 10	233, 250
Cod. 8.35.13	161 n. 339	D 54 c. 15	252
Cod. 9.1.12	93 n. 204	D 54 c. 19	232
Cod. 9.1.13	94 n. 214	D 70 c. 2	233
Cod. 9.1.16	94 n. 215	D 74 c. 8	211
Cod. 9.6.3	102 n. 301	D 74 c. 9	212
Cod. 9.22.9	274 n. 619	D 78 cc. 1–4	234
Cod. 9.22.16	229 n. 229	D 79 c. 11	234
Cod. 9.41.7	94 n. 216	D 81 c. 16	212
Cod. 9.51.13.2	93 n. 205	D 82 c. 5	262
Cod. 11.41	230 n. 232	D 84 c. 1	211
Cod. 12.53	134 n. 128	D 85 c. 1	232, 270
		D 86 c. 24	252
<i>Institutes</i>		D 96 c. 6	183 n. 82
Inst. 2.1.0	105 n. 316	D 97 c. 2	195 n. 192
Inst. 2.10.0	98 n. 259	D 100 c. 1	212
Inst. 4.6.0	142 n. 187	C 1 q. 1 c. 27	237
Inst. 4.6.33	143 nn. 192, 197, 234	C 1 q. 1 c. 97	272
Inst. 4.120.0	144 n. 201	C 1 q. 7	272
		C 1 q. 7 c. 9	228
Authenticum	xv n. 12, 45 n. 102, 125, 129, 198, 204, 214, 228, 237, 274	C 1 q. 7 q. 24	2–3
		C 2 q. 1 d.a.c. 1	261
		C 2 q. 1 cc. 1–2	261
		C 2 q. 1 c. 3	264
Pauli Sententiae, I 6 BI	49	C 2 q. 1 c. 7	241, 243–244, 248
		C 2 q. 1 c. 14	230, 241
<i>Codex Theodosianus</i>		C 2 q. 5 c. 20	261
Cod. Th. 1.16.6	103 n. 309	C 2 q. 6 c. 29	271
Cod. Th. 2.9.3	160 n. 326	C 2 q. 6 c. 30	264
Cod. Th. 2.10.5	149 n. 234	C 2 q. 6 c. d.p.c. 33	261
Cod. Th. 11.36.25	102 n. 300, 168 n. 398	C 2 q. 6 c. 34	261
Cod. Th. 11.39.3pr	154 n. 280	C 2 q. 6 d.p.c. 36	261
		C 2 q. 6 c. 38	240
		C 2 q. 6 c. 41 §6	273
Canon Law		C 2 q. 6 d.p.c. 41 §1	264
		C 2 q. 7 c. 18	226
<i>Decretum Gratiani</i>		C 2 q. 7 c. 24	244
D 4 c. 2	203	C 2 q. 7 c. 26	244
D 8 c. 2	229	C 3 q. 2 cc. 1–3	207
D 14 c. 1	237–238	C 3 q. 2 c. 5	208
D 23 c. 14	203 n. 32	C 3 q. 2 c. 8	208
D 27 c. 1	263	C 3 q. 3 c. 1	210
D 27 c. 3	271	C 3 q. 3 c. 2	209
D 28 c. 4	263	C 3 q. 3 c. 2 and §1	185 n. 102
D 28 c. 13	228	C 3 q. 3 d.a.c. 4	204
D 33 c. 6	226	C 3 q. 3 d.a.c. 4§5	204
D 33 c. 7	271	C 3 q. 3 d.p.c. 4	204, 209, 228
D 33 c. 14	203	C 3 q. 3 d.p.c. 4 §4	228 n. 221

Decretum Gratiani (cont.)

C 3 q. 3 d.p.c. 4 § 7	189 n. 138	C 5 q. 2 c. 4	204, 209
C 3 q. 3 c. 19	228	C 5 q. 3 c. 1	209, 211
C 3 q. 4 c. 8	212	C 5 q. 5 c. 4	248, 263
C 3 q. 5	238	C 6 q. 1 c. 18	248
C 3 q. 5 c. 5	240	C 6 q. 1 d.p.c. 22	241
C 3 q. 5 c. 15	258 n. 486, 260	C 6 q. 2 c. 1	250
C 3 q. 6 c. 1	255	C 6 q. 3 c. 3	259 n. 487
C 3 q. 6 d.p.c. 2	233	C 6 q. 3 c. 4	255
C 3 q. 7	254	C 6 q. 3 c. 5	255
C 3 q. 7 c. 1	253	C 6 q. 5 c. 1	249
C 3 q. 7 d.p.c. 1	253–254	C 6 q. 5 d.p.c. 1	249
C 3 q. 7 c. 2	260–261	C 7 q. 1 c. 3	211
C 3 q. 7 c. 2 §17	260 n. 482	C 7 q. 1 c. 5	229
C 3 q. 7 c. 2 §18	258 n. 482	C 7 q. 1 c. 16	206
C 3 q. 7 c. 2 §19	260 n. 499,	C 7 q. 1 c. 24	211
	261 n. 507	C 7 q. 1 c. 31	235
C 3 q. 7 c. 4	255	C 11 q. 1 c. 13	251
C 3 q. 7 d.p.c. 7	252 n. 438	C 11 q. 1 c. 15	250
C 3 q. 9	244	C 11 q. 1 cc. 18–19	212
C 3 q. 9 c. 10	212, 263	C 11 q. 1 c. 25	252
C 3 q. 9 c. 13	67 n. 67	C 11 q. 1 c. 39	255
C 3 q. 9 c. 16	248	C 11 q. 1 c. 45	273
C 3 q. 9 c. 17	240	C 11 q. 1 c. 50	232
C 3 q. 9 c. 20	244	C 11 q. 3 d.a.c. 1	273 n. 611
C 3 q. 9 d.p.c. 15: 11. Pars	242 n. 344	C 11 q. 3 c. 4	275
C 3 q. 11 cc. 1–2	230	C 11 q. 3 c. 11	275
C 3 q. 11 c. 3	231	C 11 q. 3 c. 12	213
C 3 q. 11 d.p.c. 3	230	C 11 q. 3 c. 18	275
C 4 q. 1 c. 2	230	C 11 q. 3 c. 36	212–213, 264
C 4 q. 2/3	241	C 11 q. 3 c. 66	256
C 4 q. 2/3 c. 1	258	C 11 q. 3 c. 70	256
C 4 q. 2/3 c. 2	258	C 11 q. 3 cc. 91–93	275 n. 625
C 4 q. 2/3 c. 3 §2	243	C 11 q. 3 c. 99	275
C 4 q. 2/3 c. 3 §3	239 n. 317,	C 12 q. 1 c. 18	205
	248 n. 397	C 12 q. 2 d.p.c. 57	206
C 4 q. 2/3 c. 3 §17	248	C 12 q. 2 c. 58	206
C 4 q. 2/3 c. 3 §19	240	C 12 q. 2 d.p.c. 58 §4	340 n. 241
C 4 q. 2/3 c. 3 §25	243	C 12 q. 2 cc. 62–63	205
C 4 q. 2/3 c. 3 §26	243 n. 358	C 12 q. 2 cc. 64–65	206
C 4 q. 2/3 c. 3 §27	240	C 12 q. 5 c. 3	232
C 4 q. 2/3 c. 3 §34	239	C 13 q. 2 c. 28	207
C 4 q. 2/3 c. 3 §38	240	C 14 q. 1 c. 2	234
C 4 q. 2/3 d.p.c. 2: 11. Pars	239 n. 218	C 14 q. 2 c. 2	241
C 4 q. 4 c. 3	258	C 14 q. 5 c. 1	257
C 4 q. 5 c. 1	210–212, 250	C 14 q. 5 c. 15	257
C 4 q. 5 cc. 1–2	209	C 14 q. 5 c. 15 §1	257 n. 473
C 5 q. 2. c.1	203	C 14 q. 6 c. 1	264
C 5 q. 2 c. 2	209, 212	C 14 q. 6 c. 2	272
		C 15 q. 3 c. 2	240

C 15 q. 3 d.a.c. 5	262 n. 522	C 25 q. 2	251
C 15 q. 3 c. 5	262	C 25 q. 9 d.p.c. 2	232
C 15 q. 3 d.p.c. 5	262 n. 522	C 26 q. 7 c. 12	183 n. 85
C 15 q. 4 c. 2	207	C 27 q. 1 c. 1	232, 268
C 15 q. 5 c. 2	251, 261–262	C 27 q. 1 c. 18	211
C 15 q. 6 c. 1	262	C 27 q. 1 c. 36	251
C 15 q. 6 cc. 1–2	232	C 27 q. 2 d.p.c. 18, cc.	19, 21, 236
C 15 q. 7 c. 5	209	C 29 q. 1 d.a.c. 1	231–232
C 15 q. 8 c. 1	261	C 29 q. 1 d.a.c. 1 §2	231 n. 245
C 16 q. 1 c. 5 and §1	182 n. 75	C 29 q. 2 c. 3	232 n. 248
C 16 q. 1 c. 12	190 n. 149	C 29 q. 2 c. 6	250
C 16 q. 3 c. 13	211, 232	C 30 q. 2 c. 1	232
C 16 q. 3 c. 14	232	C 30 q. 5 c. 1	207
C 17 q. 3 c. 4	272	C 30 q. 5 c. 11	256
C 19 q. 3 c. 2	275	C 31 q. 1 cc. 1–3	232
C 19 q. 3 cc. 2–3	234	C 31 q. 2 c. 1	233
C 20 q. 1 c. 10	233	C 31 q. 3 c. 1	268
C 20 q. 1 c. 16	251	C 32 q. 2 c. 13	257
C 20 q. 2 c. 1	263	C 32 q. 2 c. 16	262
C 20 q. 2 c. 2	263	C 32 q. 4 d.a.c. 1	237
C 20 q. 2 cc. 1–2	212, 233	C 32 q. 4 c. 3	237, 252 n. 439
C 21 q. 2 c. 1	235	C 32 q. 6 cc. 1–3	237 n. 303
C 21 q. 5 c. 6	183 n. 83	C 32 q. 7 c. 9	231
C 22 q. 1 c. 5	265	C 32 q. 7 c. 28	272
C 22 q. 1 c. 8	265	C 33 q. 1 c. 1	211
C 22 q. 1 c. 11	266	C 33 q. 1 c. 3	250
C 22 q. 1 c. 14	265	C 33 q. 2 c. 18	255
C 22 q. 1 c. 16	270	C 33 q. 3 c. 14	235
C 22 q. 1 d.p.c. 16	265	C 33 q. 4 c. 4	237
C 22 q. 2 c. 20	237–238	C 33 q. 5 c. 1	237, 257
C 22 q. 4	270	C 33 q. 5 c. 19	240
C 22 q. 4 c. 3–7	237	C 34 q. 1 and 2 c. 6	226
C 22 q. 5 c. 7	248	C 34 q. 1 c. 4	207
C 22 q. 5 c. 9	269	C 35 q. 3 c. 11	252
C 22 q. 5 d.p.c. 13	269 n. 578	C 35 q. 3 c. 20	271
C 22 q. 5 c. 14	270	C 35 q. 6 c. 2	233, 239
C 22 q. 5 c. 15	263, 269	C 35 q. 6 c. 4	252, 271
C 22 q. 5 c. 17	270	C 35 q. 6 c. 7	250
C 23 q. 1 c. 4	275	C 35 q. 6 c. 8	250
C 23 q. 4 c. 7	255	C 35 q. 8 c. 1	239 n. 324
C 23 q. 4 c. 33	256	C 35 q. 8 c. 2	239 n. 325
C 23 q. 5 c. 1	264	C 35 q. 8 c. 3	239 n. 326
C 23 q. 5 c. 19	228	C 35 q. 9 c. 1	232
C 23 q. 5 c. 41	255	C 35 q. 9 d.p.c. 2	226, 275
C 23 q. 5 c. 6	237–238	C 35 q. 9 c. 4	271
C 23 q. 5 cc. 1–3	226	C 35 q. 9 c. 6	271
C 23 q. 8 c. 15	206	De Con. D 1 c. 57	206
C 24 q. 3 c. 6	208, 212, 257		

Decretals

- Alexander III (JL 13982, 196 n. 198
WH 412, X 1.17.2)
- Alexander III (JL 14142, 194 n. 188
X 2.22.3)
- Alexander III (JL 14156, 193 n. 179
WH 761, X 1.3.3)
- Alexander III (JL 9226) 244 n. 367
- Alexander III (JL 12636, 232 n. 251
WH 989)
- Alexander III (JL 13793, 269 n. 589
X 4.1.7)
- Alexander III (JL 13831, 247 n. 394
X 2.20.11)
- Alexander III (JL 13894, 249 n. 407
X 2.20.16)
- Alexander III (JL 13934, 205 n. 43
WH 365, X 2.1.6)
- Alexander III (JL 14066, 248 n. 391
X 2.20.17)
- Alexander III (JL 14214) 211 n. 87
- Alexander III (JL 23878, 274 n. 614
WH 590 a–c)
- Alexander III (JL 8065, 210 n. 76
X 2.28.5)
- Alexander III (JL 9413, 245 n. 375
X 2.20.15)
- Alexander III (JL 9032, 244 n. 366
9033, 9034, X 2.21.3)
- Eugenius III (JL 6684, 227 n. 216
X 2.7.2)
- Eugenius III (JL 9067, 217 n. 238
X 2.20.6)
- Honorius II (JL 7401, 59 n. 34, 227 n. 215
X 2.7.1)
- Innocent II (JL +8099) 68 n. 70
- Lucius III (JL 14966, 177 n. 42
X 2.28.36)

Commentators**Civil Law**

- Placentinus, *Summa Codicis* 203 n. 30, 230 n. 233,
235 n. 289, 238
n. 312, 257 n. 473,
258 n. 477, 259
n. 490
- Placentinus, *Quaestiones de iuris subtilitatibus* 128 n. 93, 198,
254 n. 452

- Rogerius, *De diversis praescriptionibus Summa Trecensis* 105 n. 322, 119, 125,
127, 138
127, 160 n. 324
- William of Cabriano, *Casus codicum* 128, 147 n. 222,
158 n. 312, 160
n. 328, 164 n. 362,
165 n. 372, 169
n. 402, 199, 251
n. 422, 265 n. 541
- Canon Law
- Summa Elnonensis* 114 n. 15, 152 n. 260,
222 n. 170, 260
n. 501, 298
- Summa of Johannes Faventinus* 199, 263 n. 530,
264 n. 537
- Summa Lipsiensis* 197, 199, 218 n. 143,
219 n. 145, 233 n. 279,
238 n. 310
- Summa Parisiensis* 124
- Summa Rufini* 208 nn. 64, 69,
210 n. 77, 212 n. 96,
238 n. 310, 242 n. 348,
247 n. 389, 264
n. 539, 266 n. 550,
270 nn. 587, 589,
273 n. 611
- Summa Simonis* 218 n. 145, 239 n. 320,
248 n. 40, 257 n. 469,
261 n. 505, 264
n. 536, 269 nn. 579,
582
- Summa Stephani* 208 n. 64, 212 n. 96
- Collectio Francofurtana* 117 n. 26, 146 n. 216,
186 n. 112, 193 n. 179,
194 n. 188, 195 n. 191,
196 n. 198, 200 n. 16,
205 n. 43, 216 n. 122,
220 n. 154, 222 n. 167,
227 n. 215, 232
n. 362, 244 nn. 377,
368, 245 n. 375,
274 n. 614
- Extravagantes* 205, 211, 216–217,
222, 227–228, 232,
244, 269, 274

III Lateran Council, can. 12 200, 225

Bible

Exodus 15.25 65 n. 58
Exodus 20.18 242 n. 353
Joshua 22.19 68 n. 71
II Samuel 12.24 246 n. 385
I Kings 3.16–28 246 n. 383
II Chronicles 11.15 183 n. 80
Esther 14.13 66 n. 64
Psalm 2.7 246 n. 384
Psalm 24.9 68 n. 74
Psalm 33.9 242 n. 350
Psalm 41.11 242 n. 352
Psalm 49.21 65 n. 60

Psalm 85.13 72 n. 89
Psalm 118.127 68 n. 73
Psalm 138.17 72 n. 85
Song of Solomon 2.14 62 n. 46
Daniel 13.51 245 n. 381
Matt. 10.16 182 n. 76
Matthew 16.16 75 n. 99, 182 n. 76
Matthew 19.6 66 n. 65
Matthew 25.21–25 68 n. 72
Mark 1.11 246 n. 384
Mark 8.18 71 n. 84
Luke 24.39 242 n. 239
Romans 13.12 71 n. 82
Romans 14 267 n. 559
I Thessalonians 4.6 183 n. 77
Hebrews 6.16 157 n. 307, 265 n. 543

General Index

- Abelard, Peter 30
Absence 43, 44, 67, 99, 101, 118, 135–137,
151, 161–162, 164, 166, 173, 180–181, 191,
194–195, 208, 210–213, 222–223, 226, 244,
253, 258, 263
Accusation 15, 48, 94, 97, 150, 176, 184, 204,
214, 231
Acta, episcopal 118, 120–122, 179
Actio familiae hersicundae 85
Actio in rem 6 n. 44
Actio mandati 109
Actio tutelae 118
Actor (See also Plaintiff) 1, 24, 94, 122
Actors 94
Administration 98, 190, 198, 218, 269
Adultery 45, 47, 95, 97, 102, 159, 230, 247
Advocates 6, 20, 29, 41, 53–54, 57, 79, 83, 86,
90, 97, 123, 125, 141, 148–150, 157, 175, 177,
187, 217–218, 224, 226, 236, 240, 256
Age 45, 62, 93, 131, 191, 200–201, 210, 219, 225,
232, 253, 269, 271
Alexander III, Pope 78, 116, 119, 121, 172
Allegations 101–102, 133, 199, 226, 272
Ambrose of Milan, St. 6
Analogy 79
Ananias xi
Annona 94
Anstey Case 78–79
Antapocha 251
Antioch xi
Apocha 251
Apostolos 170
Apparitores 134, 137
Appeal 2, 4–6, 11, 14, 45, 82, 89, 99, 101–103,
115, 126–127, 133, 137, 145, 157, 164–165,
168, 170, 173, 177, 179, 187, 189, 211–213,
220, 260, 264, 268, 274–275, 278
Appellant 102, 170
Apud iudicem 2
Aquinas, St. Thomas 141 n. 176
Arbiters 2, 5–7, 11, 57, 83, 86, 88, 98, 164, 202,
260–261
Arbitration 4, 5, 8, 20, 22, 25, 88, 164, 261
Archdeacons xiv, 19, 23, 45–46, 69, 115, 175
Archpriest 19
Arezzo 60
Ars dictaminis 29, 176
Audientia episcopalis xiii, 4, 6, 12, 21, 77
Augustine, St. 5, 6, 11, 77
Augustus, Emperor 59
Bartholomew of Exeter, Bishop 248 n. 401
Bassianus, Johannes 166 n. 297, 176, 198,
235 n. 288, 269 n. 576
Bauer, Dominique 282
Becket, St. Thomas 8, 48–49, 117, 129, 131,
166 n. 377, 172, 179
Benedictus Levita 14, 49
Berman, Harold 34, 40, 51 n. 29, 278 n. 13
Bernard of Clairvaux, St. 64
Bernhard of Hildesheim, Bishop 32
Bernold of Constance 31
Bible xvii, 38, 78, 181, 201
Bills 100, 168, 201
Bologna 33, 80, 112, 114, 176
Brachylogus 125
Brand, Paul 50 n. 23, 79, 139 n. 164
Brett, Martin 34 n. 42, 120 n. 100
Bribery 100, 103, 141
Brother 94, 182, 227
Bulgarus xiii, 79–85, 104, 128, 130–131, 181,
188 n. 129, 203
Burchard of Worms, Bishop xviii n. 32, 21
Burial 23–25
Calumny 58–60, 72, 78, 87, 94, 121, 140,
227–228, 234
Canterbury 122, 178–179
Capital punishment 5, 94, 151, 159
Capitula Angilramni 14
Capitularies 15, 17
Caritas 284
Causae maiores 7 n. 54
Causidicus 149
Celibacy 31
Certi condicione 118
Charge xviii, 46–47, 88, 98–99, 104, 110, 118,
132, 136–137, 140, 142–145, 148–149, 151,
158–159, 162, 164, 167, 177, 179, 184, 186,
203–204, 208, 233, 249

- Charlemagne, Emperor 17–18
 Charters 27, 54, 91, 118, 133
 Children 100, 253
 Chirograph 92, 133
 Cistercians 120
 Civil case 136, 171, 201, 217, 225, 239, 244, 255, 264
 Civil interruption 147
 Co-heirs 85, 108, 21
 Codex xv n. 12, 12, 25, 87 n. 158, 127, 128, 169, 198
 Cognitio extra ordinem 2, 6
 Collection in 74 Titles xvi
 Compensation 142, 236
 Compromise 9, 17, 20, 22, 25, 259–260
 Comyn, Archbishop John 244, 328
 Conductio 234 n. 279
 Confession 264
 Conscience 167, 269
 Constantine, Emperor 3–4, 59
 Constantinople 59
 Consultation 17, 100, 168, 177
 Consul 93, 156
 Continuance 158
 Contract 106, 140, 158, 160, 178, 184, 190, 193, 216
 Contumacy 32, 78, 88, 137, 210, 212–213, 274
 Corpus iuris civilis xv, 8, 53, 61, 113
 Council of Northampton 117, 122
 Counterfeiting 97, 174
 Creditor 109
 Crime 94–95, 102–103, 138, 159, 163, 171, 196, 202, 211–212, 214–215, 217–218, 224, 230, 235, 237, 244, 254, 264, 270
 Criminal case 89, 136, 201, 213, 225, 263
 Criminous clerics 13 n. 95
 Curatorship 100
 Curator 107, 190, 269
 Custom 102, 118, 165, 186, 227, 249, 253

 De edendo, Pseudo-Ulpianus xiii–xiv, 82, 84, 112, 116–119, 121–123, 1250130, 149 n. 234, 178–179, 181, 198–199
 Deadlines 101, 137
 Debt 107, 135, 143–144, 159, 215, 235–236, 242, 268
 Deception 58, 67, 74, 138, 140, 149, 160, 163, 195, 232, 269

 Decretals 131
 Decretists 114, 131, 200, 179, 212
 Decretum of Gratian xvi, xix, 15, 112–114, 124, 126, 169, 199
 Decurion 96, 103
 Defendants xvii n. 28, 1, 37, 43, 82–83, 86–87, 91–92, 94, 97–99, 101, 104, 132–137, 139–141, 143–145, 151–153, 177, 183, 185–187, 189–191, 193, 202–205, 210, 212–214, 221–222, 225–226, 228, 230–231, 233, 240, 249, 253, 258, 261, 264, 268
 Defensor 11 n. 79
 Degradation 171
 Delay 14, 45, 134, 138, 140, 144, 150–151, 163, 170, 189, 196, 209, 213, 233, 245, 278
 Delict 93, 250, 253
 Denunciatio evangelica 3
 Deposit 88
 Detention 147
 Dialectic 10, 30, 33, 84, 113
 Didascalia apostolorum 3
 Digest xiii, xviii, 12, 24, 53, 55–56, 58, 61, 83–84, 108, 125, 198
 Dispensation 85, 134, 213, 271
 Dissensiones dominorum 128, 199
 Documents 29, 71, 104, 118, 122, 133, 151, 154, 160, 163, 176, 180, 203, 209, 213, 224, 251, 252, 274
 Donatio inter vivos 85, 108
 Donation 85, 106, 158
 Double jeopardy 49
 Duggan, Anne 117
 Duggan, Charles 116
 Duplication 93
 Durham 124
 Duumvir 103

 Editio actionis 123
 Elderly 95, 154
 Epao, Council of 13
 Epitome Juliani xv n. 12, 45 n. 102, 129
 Equity 108, 254
 Error 232
 Error of fact 202
 Error of law 202
 Eugenius III, Pope 227
 Exceptio rei iudicatae 127, 145 n. 206, 261 n. 509

- Exceptio spoli 14 n. 102, 207 n. 60
 Exceptions 14, 43, 45, 45 n. 100, 54, 79, 83, 99,
 91–92, 95, 98–99, 106, 108, 110, 127–128,
 138, 143–146, 158, 161, 178–180, 182,
 188–189, 190–192, 196, 200–201, 217, 223,
 231–233, 243, 250, 258, 261, 268
 Excommunication 21, 72, 198, 212, 273, 275
 Execution 102, 163, 169, 185, 191, 222, 261, 272
 Executor 102, 148, 162, 168, 185
 Expenses 101, 135–137, 162–163, 179, 185, 204,
 214
 Extra-judicial 57, 267

 Favor 233
 Feud 24
 Feudal revolution 20, 27
 Fleury 17
 Foliot, Gilbert Bishop 124, 130, 179
 Forgery 14, 67, 80, 94, 121, 159, 188
 Fournier, Paul 40
 Fraud 66, 87, 144, 216, 256
 Freedmen 93, 205–206
 Funeral 137, 207, 223

 Gaius 194 n. 182
 Generalis pactio 232
 Gérard Pucelle 117
 Gero of Alsleben, Count 23
 Gifts 24, 63, 137, 185, 216, 256
 Gladiators 97, 248
 Glanvill 174, 178
 Glossaries 16
 Good faith 127, 146, 151, 153–154, 243
 Gospels 55, 87, 253, 266
 Gouron, André 124–126, 128, 130
 Governor 2, 87, 106
 Gratian xvi, xix, 15, 34, 48, 83, 113–114, 119,
 123–124, 126, 131, 176, 199–200, 209,
 232 n. 259, 241, 243, 249
 Gravitas 96
 Gregory VII, Pope 31, 45, 70
 Gregory the Great, Pope 11
 Gregory of Tours, Bishop 13
 Guardianship 100, 109, 251

 Haimeric, Chancellor xiii, 62–64, 72, 77,
 79–83, 86, 203
 Hariulf, Abbot xiii, 6–62, 68, 77–82, 86, 118,
 178

 Health 102, 137, 210, 223
 Hearsay 202, 242
 Henry II, King 8, 48, 117, 121, 125, 172
 Henry III, Emperor 58–59
 Henry IV, King and Emperor 31
 Heretics 9, 36
 Hincmar of Laon, Bishop 15
 Hincmar of Rheims, Archbishop 15, 20, 22,
 32
 Holtzmann, Walther 116
 Homicide 247
 Honestiores 7
 Honorius, Emperor 8
 Honorius II, Pope 59–60, 82, 227 n. 215,
 228 n. 218
 Hubert Walter, Archbishop 173
 Hugh of Die, Archbishop 44, 172
 Humiliores 7
 Husbands 106

 Illness 45, 154, 207
 Illustres 102
 Immunity 15, 20
 In iure 2
 In ius vocatio (See also Summons) 1, 35
 Infamy 46, 48, 89, 93, 96–97, 153, 160, 187,
 190, 225, 230, 241, 248, 260, 266
 Ingratitude 205
 Ingungorius 36, 38
 Inheritance 7, 12, 79, 84, 105, 109
 Injury 90, 94, 149, 158, 178, 193, 235
 Innocent II, Pope xiii, 62, 83
 Inscription 94
 Institutes 125, 198
 Instruments, legal (See also Documents) 12,
 133, 163, 180
 Interdiction 232
 Interlocutory Statements and Judgments
 110, 167, 258, 271
 Intestacy 109–110
 Investiture Contest xvi, 14, 31, 33, 38, 60
 Irnerius 80, 265 n. 540
 Isidore of Seville, Bishop 12, 16, 42,
 158 n. 309, 269 n. 581
 Iudex (See also Judge) 21
 Iudex ordinarius (See also Ordinary Judge) 2
 Iudicium (See also Judgment) 21
 Ius xvii
 Ius commune xii, xiv, 39, 51, 56, 85, 182

- Ius gentium 12
 Ius novum 115–116, 179, 200
 Ius patronatus 119
 Ivo of Chartes, Bishop xiii, 35, 38–39, 42,
 47–50, 52, 122

 Jerome, St. 48, 74 n. 92
 Jesus xi
 Jews 2, 202
 Joinder of issue (See also *Litis contestatio*)
 xviii n. 30, 1, 99, 185, 189, 191, 196, 233,
 235, 259–260
 Judges 1, 2, 8, 19, 22, 36–37, 41, 43, 47–48,
 57, 79–80, 82–83, 85–88, 90, 95, 97–99,
 102–105, 109–110, 123, 125, 131, 133–135,
 137–138, 140–141, 145, 148–151, 154–157,
 160–168, 170–171, 175, 177–180, 183,
 185–193, 195, 197, 199, 202, 204, 208–210,
 212–215, 222, 225–226, 240, 244,
 247–248, 250, 252–267, 271–273, 275
 Judges-delegate xiv, 115
 Jurisdiction 2, 4, 8–9, 12–13, 18, 31, 87, 122,
 140, 161, 165, 177–178, 180, 188–189, 191,
 255, 259
 Justinian, Emperor xiii, 8, 59, 169, 268

 Kantorowicz, Hermann 284
 Kuttner, Stephan 36

 Lagny 178, 181, 193
 Landau, Peter 124, 130
 Lateran II, Council 112
 Laws of Ine 130
 Legal change 34, 40–41, 50
 Legates xiv, 32, 35, 42, 48, 165, 172–173, 179,
 191, 195
 Legis actiones 1
 Leo the Great, Pope 235 n. 288
 Leo IX, Pope 31
 Lex Ribuaria 52
 Lincoln 130
 Litis contestatio (See also Joinder of
 Issue) 1
 Living voice 168
 Loans 107, 174, 184
 Lombard Law 58
 Louis the Pious, Emperor 18
 Lucius III, Pope 177, 187, 197, 201, 222,
 228

 Magistrates 102, 11 n. 79, 55, 93, 103, 108, 132,
 138, 164–165, 223, 264
 Maiestas 94
 Maitland, F.W. 40
 Malice 233
 Mandate 12, 139, 269
 Marbode of Rennes, Bishop xiii, 35
 Marriage 43, 106, 200–201, 211, 239, 241, 256
 Marturi xiii, 54
 Matthew, St. xi
 Mercy 283
 Messengers 45
 Milsom, S.F.C. 40–41, 51
 Minors 84, 100, 105, 190, 200–201, 212 n. 94,
 219, 225, 263, 268
 Miracles of Saint Benedict 17
 Missi dominici 18
 Montpellier 35
 Mothers 43, 94, 106
 Murderers 102

 Ne bis idem (maxim) 49
 New Testament xi, 3
 Nicholas I, Pope 18, 47
 Non-contradiction 9, 30
 Notaries 29
 Novellae xv n. 12, 25, 45–47
 Nullius res sacrae et religiosae et sanctae
 (maxim) 84

 Oaths (See also Vows) 6, 18, 22, 43, 84, 156,
 192, 198, 228, 232
 Object of a pending suit 232
 Olim edebatur actio 129
 Ordeal 22, 26, 45, 47, 114, 282 n. 33
 Ordinary judges 202, 258
 Ordines iudiciorum xiii, 60
 Ordo Bambergensis vii, xiii–xiv, 85, 181,
 197–198, 200–203
 Ordo iudiciarius 11, 14, 31, 35, 42, 45, 51
 Ordo iudicis 11
 Orphans 13 n. 97, 154
 Overclaims (See also Plus Petitio) xiii n. 30,
 143, 234
 Ownership 107, 135

 Pacts 12, 23, 75, 106, 110, 128, 145, 158–160, 196
 Pandering 94, 230
 Panofsky, Erwin 285

- Parable 79
 Parents 95, 109
 Paschal II, Pope 44, 47, 61, 69
 Patronage 20, 80, 181
 Paucapalea 99 n. 272, 114, 265 n. 540
 Paul, St. xi
 Pauli Sententiae 190 n. 150
 Peace of God 29, 32
 Pecuniary cases 98, 151, 171, 219, 228, 274
 Penance 21, 113, 170, 235, 248, 262, 271
 Pennington, Kenneth 56, 86 n. 150
 Pepo 53–54, 56
 Peremptory edict 102, 122, 134–135, 161, 208
 Peremptory exception 145, 233
 Perjury 157, 249, 270
 Peter, St. xi
 Placentinus 126–128, 131, 132 n. 119, 198
 Placita 18, 53 n. 8
 Plaintiffs 1, 11, 37, 43, 58, 82–83, 86–87,
 97–99, 104, 123, 133–141, 143–145,
 151–152, 161, 166, 171, 183, 185, 187,
 189–191, 193, 196, 199, 202, 204, 213–214,
 221, 225, 228, 231, 233, 249, 253, 258, 261,
 267
 Plebeians 96
 Plenitudo potestatis (maxim) 177
 Plus petitio, (See also Overclaim) xviii n. 30
 Poem, slanderous 96–97
 Poisoners 102
 Possession 12, 42, 100, 103, 105, 121–122,
 127, 134–135, 147, 151–152, 162, 196, 201,
 212–215, 235
 Possessor 69, 105, 147, 152, 161–162, 169,
 212–213, 215, 257
 Poverty 94, 100
 Practica legum et decretorum xiii–xiv,
 172–173, 175–176, 178–182, 197–198, 201,
 203
 Praescriptio (See also Prescription) 122
 Praetor 1–2, 55, 87, 93, 97, 180, 188, 225
 Praetorian prefect 59, 103
 Prefect 87, 101
 Prejudice, legal 142, 150, 169, 194, 249, 251,
 263
 Prescription 42, 54, 111, 118–122, 127, 144, 146,
 161, 179, 188 n. 129, 214
 Presumption 202, 240
 Privileges 3, 32, 72, 129, 140, 155, 179, 188–189,
 191, 206, 253, 261
 Privilegium fori 3, 13 n. 98, 179
 Proceduralist society 51, 282
 Proclamatio 99
 Proconsul 165, 170
 Proctors 98–99, 129, 139, 141, 151, 154, 178, 190,
 195, 200, 214, 217–218, 220–223, 268
 Profits 162, 216
 Proof 2, 22, 83–84, 92, 96, 104, 126, 144–145,
 150, 152, 202, 233, 249, 252, 267
 Property 7, 13 n. 97, 20, 28, 71, 84, 93, 105,
 107–109, 111, 119–121, 134, 140, 143, 147,
 151, 160–162, 167, 169, 184, 187, 192, 212,
 214–215, 217–218, 222
 Provocatio (See also Appeals) 2, 99
 Pseudo-Isidore 14, 17, 31, 38, 49
 Purgatio canonica 27 n. 8, 48
 Quadripartitus 15 n. 107, 130
 Quaestor 102
 Ratification 139
 Reclaiming 108, 163, 257
 Recusal 177, 180, 187
 Regino of Prüm xvi n. 18, 19, 21
 Regulae iuris 83, 85
 Relics of Saints 266
 Rent 148 n. 223
 Replication 54, 93, 231
 Reputation 103, 149, 153, 225, 252, 260
 Rescript 96, 115, 155, 161, 170, 177, 180, 186,
 189, 194–195, 228, 259, 260
 Restitutio in integrum 55 n. 15, 163 n. 358,
 208 n. 63, 211 n. 84, 230 n. 235, 271 n. 599
 Retendering oath 157, 267
 Reus (See also Defendant) xvii, 1
 Revocation 232
 Reynolds, Susan 50–51
 Rhetoric 12, 16, 29–30
 Richard I, King 172
 Richard of Anstey 80
 Richardus Anglicus xiv, 203
 River 138
 Rogerius 105 n. 322, 119, 125, 127, 138
 Rufinus 199, 263 n. 530
 Sacramentum de calumnia (See also
 Calumny, Oaths) 58
 Sanctuary 13
 Sapphira xi

- Schieffer, Rudolph 34
 Scholastic method (See also Dialectic) 10, 30, 33
 Senatusconsultus Macedonianum 106 n. 323
 Sendgericht 18, 20
 Sententiae Pauli 49
 Serdica, Council of 6
 Serfs 79, 2 41, 260
 Sienna 60
 Simon of Bisignano 199
 Simony 31, 38, 48, 218, 256
 Slaves 94, 98, 105, 109–110, 143, 230, 269
 Sohm, Rudolf 34
 Soldiers 93, 109, 140, 188, 190
 Solomon 246
 Sons 94–95, 106–107, 109, 206, 239, 251
 Southern, Richard W. 284
 Specialis nuncius 178
 Spectabiles 101
 Stephen II, King 120
 Stephen of Tournai, Bishop xix, 114, 263 n. 530
 Stipulation 88, 92, 106, 108, 158, 234
 Storms 138
 Summons to court (See also In ius vocatio) 1, 133, 198, 207
 Surety 104, 135, 137–139, 145, 170–171, 177, 185–186, 190, 204, 212–214, 221, 228, 234–235, 238
 Susanna and the Elders 201, 245 n. 381
 Syllogism 84
 Tancred of Bologna xiv, 203
 Temerity 150, 211
 Tendering oaths 157, 167, 204, 267–268
 Testaments 10, 12, 71, 71, 94, 109, 138, 229, 239
 Testator (See also Witnesses) 110, 251
 Testimony 47, 80, 91, 94, 96, 121, 141, 152, 154, 163, 200–202, 217, 238, 239 n. 320, 242–243, 246, 256
 Theft 44, 105, 110, 158, 162
 Theodosian Code xv, 8, 18
 Time 232
 Tithes 120, 122, 227
 Torture 5, 97, 248, 262, 264
 Transaction 144, 159–160, 234
 Trivium 6, 16, 30
 Turpitude 107
 Twelve Tables 1
 Ulpian 49, 123
 Urban II, Pope 61
 Usury 105
 Vacarius 124, 131, 197
 van Caenegem, R.C. 283
 Vengeance 13
 Violence 5, 13, 24, 47, 102, 110, 162, 223, 262
 Vow 55, 140–141, 160, 185, 228, 251, 264, 266, 270
 Wickham, Chris 54, 127
 Widows 13 n. 97, 154
 Wife 106
 William of Cabriano 128, 199
 William of Longchamp xiii, 172, 201, 182
 Witnesses 11–12, 15, 18, 24, 27, 37, 43, 46–47, 54, 83, 86, 95, 99, 102, 104, 114, 121, 132, 137, 140–141, 151, 153–154, 163, 167, 175, 182, 202, 213, 238–239, 242–244, 247, 251–252, 254, 256, 258, 263–264, 269–270, 274
 Women 7, 15, 43, 60, 93, 106, 109, 190, 211, 231, 253